179 (1)

Supreme Court, U.S.
FILED

10-890 DEC 30 2010

No. OFFICE OF THE CLERK

In The Supreme Court of The United States

MIDLAND CENTRAL APPRAISAL DISTRICT,
Petitioner,

v

BP AMERICA PRODUCTION CO., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE 11TH DISTRICT AT EASTLAND

PETITION FOR WRIT OF CERTIORARI

KIRK SWINNEY
McCreary, Veselka, Bragg & Allen, P.C.
700 Jeffrey Way, Suite 100
Round Rock, Texas 78665-2425
(512) 323-3200
kswinney@mvbalaw.com
Counsel for Petitioner

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTIONS PRESENTED FOR REVIEW

This case specifically involves *ad valorem* taxation of an immense inventory of oil constantly present in a number of large tanks and whether that oil is shielded from taxation by the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, because individual barrels come and go quickly. Thus the broader question is:

Given a constantly present massive inventory of goods bound for interstate commerce, does the fact that individual units of those goods are "in transit" result in the goods being exempt from local taxation under the dormant Commerce Clause?

PARTIES TO PROCEEDING BELOW

PETITIONER:

Midland Central Appraisal District.

The petitioner is a governmental entity, specifically a political subdivision of the State of Texas. It is not a nongovernmental corporation. No statement is required under Rule 29.6.

RESPONDENTS:

BP America Production Co., Amerada Hess Trading Company, Chevron USA, Inc., ChevronTexaco Products Company, ChevronTexaco Global Supply and Trading Company, Teppco Crude Oil LLC , and Teppco Crude P/L LLC.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i
PARTIES TO PROCEEDING BELOW ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES vi
PETITION FOR WRIT OF CERTIORARI 1
CITATIONS TO DECISIONS BELOW 2
STATEMENT OF JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS 3
1. U.S. Const. art. I, § 8, cl. 3 3
2. Tex. Tax Code §11.01(a)-(c) 3
STATEMENT OF THE CASE 4
REASONS FOR GRANTING THE PETITION 7
I. Policy overview 7
II. Dormant Commerce Clause jurisprudence 11
A. Dormant Commerce Clause jurisprudence supports taxing the oil. 11
1. Constant presence of massive quantities 12
2. "In transit" is inconsequential 15
3. Conflicts with other states 20
a. Oklahoma 20
b. Mississippi 23
c. Louisiana 24
d. Florida 24
4. Activities emphasis is misplaced 24

5. Scholarly treatise finds fault with *BP America* 26
6. Nexus from the ground. 28
B. *Complete Auto* is completely met 28
III. No independent state law ground exists. 30
A. The putative state law ground is not adequate. 30
B. The court of appeal's ruling on § 21.02 is not independent of its holding on the dormant Commerce Clause. 31
C. There is no plain statement of independent reliance on a state law ground. 33
D. The putative state law ground is not a bona- fide issue 33

CONCLUSION AND PRAYER 34

APPENDICES A-1

APPENDIX A:
Midland Central Appraisal District v. BP America et al., No. 07-00048 Opinion (11th Cir. Ct. App. Mar. 26, 2009) A-2

APPENDIX B:
Midland Central Appraisal District v. BP America et al., No. 09-0273 Order Denying Petition for Review (Tex. Sup.Ct. Mar. 12, 2010) A-23

APPENDIX C:
Midland Central Appraisal District v. BP America et al., No. 09-0273 Order Denying Motion for Rehearing (Tex. Sup. Ct. Oct. 1, 2010) A-24

APPENDIX D:
BP America et al., v. *Midland Central Appraisal District* No. CV-44864

(Consolidated) Findings of Fact (238th Dist. Ct. Jan. 23, 2007).....A-25
APPENDIX E:
Tex. Tax Code Ann. § 21.02.....A-36
APPENDIX F:
States with personal property taxes A-37
APPENDIX G:
Midland Central Appraisal District v. BP America et al., No. 09-0273 Petition for Review (Tex. Sup. Ct. May 20, 2009).....A-39

TABLE OF AUTHORITIES

CASES

American Steamship Co. v. Limbach, 572 N.E.2d 629 (Ohio 1991) 18
Braniff Airways, Inc. v. Nebraska State Board of Equalization & Assessment, 347 U.S. 590 (1957) 32
Chesapeake and Potomac Telephone Co. of Maryland v. Comptroller of Treasury, 528 A.2d 536 (Md. Ct. Spec. App. 1987) 18
Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 28
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) ..... *passim*
Dallas County Appraisal Distict v. L.D. Brinkman & Co., Inc., 701 S.W.2d 20 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) 30
DH Holmes Co. v. McNamara, 486 U.S. 24 (1988) ..... *passim*
Diamond Shamrock Refining & Marketing Co. v. Nueces County Appraisal District, 876 S.W.2d 298 (Tex. 1994) 13
Enterprise Irrigation District v. Farmers' Mutual Canal Co., 243 U.S. 157 (1917). 32
Havill v. Gurley, 382 So.2d 109 (Fla. Dist. Ct. App. 1980) 24
In re Assessment of Personal Property Taxes Against Missouri Gas Energy, 234 P.3d 938 (Okla. 2008), *cert. denied*, 130 S.Ct. 1685 ..... *passim*
Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 14, 15, 25

Kentron, Inc. v. State Board of Tax Commissioners, 572 N.E.2d 1366 (Ind. Tax 1991)..... 18
LeLoup v. Port of Mobile, 127 U.S. 640 (1888)..... 11
Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287 (1998)..... 28
Massachusetts v. Upton, 466 U.S. 727 (1984)..... 33
MeadWestvaco Corp. v. Illinois Department of Revenue, 553 U.S. 16 (2008)..... 28
Michigan v. Long, 463 U.S. 1032 (1983)..... 30
Midland Central Appraisal District v. BP America Production Company et al., 282 S.W.3d 215 (Tex. App. – Eastland 2009, petition denied).....*passim*
Miller Brothers Co. v. Maryland., 347 U.S. 340 (1954)..... 32
Mississippi River Transmission Co. v. Simonton, 442 So.2d 764 (La. Ct. App. 1983), *writ denied.*, 444 So.2d 1240 (La. 1984)..... 19, 24
Mississippi State Tax Commission v. Murphy Oil USA, Inc., 933 So.2d 285 (Miss. 2006)..... 8, 23
Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995)..... 28
Pelts & Skins, L.L.C. v. Louisiana Deptartment of Wildlife and Fisheries, 938 So.2d 1047 (La. App. 1 Cir. 2006)..... 18
Peoples Gas, Light, & Coke Co. v Harrison Central Appraisal District, 270 S.W.3d 208 (Tex. App.— Texarkana 2008, petition denied).....*passim*
Polar Tankers, Inc. v. City of Valdez, 129 S.Ct. 2277 (2009)..... 25
Predka v. Iowa, 186 F.3d 1082 (8th Cir. 1999)..... 18
Quill v. North Dakota, 504 U.S. 298 (1992).....9, 25, 26, 32

Rowan Companies, Inc. v. Louisiana State Tax Commission, 623 So.2d 159 (La. App. 1 Cir., 1993) 17
Sterling Custom Homes, Inc. v. Commissioner of Revenue, 1985 WL 6207 (Minn. Tax 1958) 19
T. A. Operating Corp. v. State Department of Revenue, 767 So.2d 1270 (Fla. App. 1 Dist. 2000) 18
Tax Commissioner of West Virginia v. MBNA America Bank, 640 S.E.2d. 2265 (W. Va. 2006) ... 32
Trinova Corp v. Michigan Department of Treasury, 498 U.S. 358 (1991) 25
United Gas Pipe Line Co. v. Whitman, 390 So.2d 913 (La. Ct. App. 1980), *writ denied.*, 396 So.2d 928 (La. 1981) 19, 24
United States v. International Business Machines Corp., 517 U.S. 843 (1996) 19
Virginia Indonesia Co. v. Harris County Appraisal District, 910 S.W.2d 905 (Tex. 1995) *cert. denied*, 518 U.S. 1004 (1996) 19

CONSTITUTIONAL PROVISIONS

Tex. Const., Art. VIII, § 2 30
U.S. Const. amend. XIV, § 1 32
U.S. Const. art. I, § 8, cl. 3 ..... *passim*
U.S. Const. art. I, § 9, cl. 5 20
U.S. Const. art. I, §10, cl. 2 ..... 19, 20

STATUTES

28 U.S.C. § 1257(a) 2
Tex. Tax Code §11.01 ..... 3, 28, 31
Tex. Tax Code §21.02 ..... *passim*

SUPREME COURT RULES

U.S. Sup. Ct. Rule 10(b) 8, 9
U.S. Sup. Ct. Rule 10(c) 7, 9

TREATISES

Jenkins, *State Taxation of Interstate Commerce*, 27 Tenn. L. Rev. 239 (1960) 25
Jerome Hellerstein & Walter Hellerstein, *1 State Taxation* (3d ed. 2010). 17, 27, 32

OTHER

Brief of U.S. as *Amicus Curiae*, *Missouri Gas Energy v. Schmidt*, No. 08-1458 ..... *passim*
Petition for Writ of Certiorari, *Ashworth L.L.C. v. Department of Revenue, Finance Administration Cabinet, Commonwealth of Kentucky*, No. 10-662 26
U.S. Energy Information Administration, www.eia.doe.gov/dnav/pet/pet_stoc_cu_s1_m.htm (last visited Dec. 8, 2010) 10
YouTube, http://www.youtube.com/watch?v=NVzxohzcni8 (last visited Dec 9, 2010) 29

IN THE
SUPREME COURT OF THE UNITED STATES

MIDLAND CENTRAL APPRAISAL DISTRICT,
Petitioner,

v.

BP AMERICA PRODUCTION CO., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI

The Texas court of appeals below has held a generally applicable, non-discriminatory *ad valorem* tax on an inventory of oil to violate the dormant Commerce Clause. On substantially similar facts, the Oklahoma Supreme Court concluded otherwise. When the Oklahoma case was brought to this Court's attention, it sought the input of the United States Solicitor General who concluded that the Oklahoma Court ruled correctly. Brief of U.S. as *Amicus Curiae, Missouri Gas Energy v. Schmidt*, No. 08-1458. Another Texas case, *Harrison Central Appraisal Dist. v. Peoples Gas Coke & Light Co.*, No. ___, is also before this Court, having been decided similarly to this case below. Thus, a dichotomy of state court opinions exist on a key issue of Constitutional law which begs for this Court's resolution.

CITATIONS TO DECISIONS BELOW

The official cite to the case for which this Petition for Writ of Certiorari is sought is: *Midland Central Appraisal District v. BP America Production Company et al.*, 282 S.W.3d 215 (Tex. App. – Eastland 2009, petition denied). The trial court issued findings of fact and conclusions of law. Appendix D.

STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this case under 28 U.S.C. § 1257(a) because it involves a substantial federal question decided by a state court of last resort. The Texas Supreme Court denied the petition for review on May 12, 2010 and denied the motion for rehearing on October 1, 2010. Appendix B, C. The Petitioner has not sought any extensions for filing this petition for writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. U.S. Const. art. I, § 8, cl. 3:

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes

2. Tex. Tax Code §11.01(a)-(c):

> (a) All real and tangible personal property that this state has jurisdiction to tax is taxable unless exempt by law;
> (b) This state has jurisdiction to tax real property if located in this state;
> (c) This state has jurisdiction to tax tangible personal property if the property is;
>
> (1) located in this state for longer than a temporary period;
> (2) temporarily located outside this state and the owner resides in this state; or
> (3) used continually, whether regularly or irregularly, in this state.

STATEMENT OF THE CASE

Similar to *In re Assessment of Personal Property Taxes Against Missouri Gas Energy*, 234 P.3d 938 (Okla. 2008), *cert. denied*, 130 S.Ct. 1685 (2010), this case involves enormous quantities of hydrocarbons, in this case oil, constantly present in a holding facility. As in *Missouri Gas Energy* and *Peoples Gas, Light, & Coke Co. v Harrison Central Appraisal District*, 270 S.W.3d 208 (Tex. App.—Texarkana 2008, petition denied), this case presents the question of whether a non-discriminatory *ad valorem* tax on that oil is prohibited by the dormant Commerce Clause.

The Respondents are "Oil Companies," each of which owned a massive inventory of crude oil during the tax years 2003 and 2004, as they have for many previous years, that was continuously present in the four tank farms in Midland, (collectively, "the Midland tank farms"). Reporter's Record (RR) 3:93-94; D. Ex. 2, 7, 15, 16, 19, 20, 27-29, 33-54, 75-92. Because of the tank farms, Midland is the only marketing center for oil in Texas. RR 5:76; 7:39, 96. The Midland tank farm facilitates the Oil Companies' marketing activities; it allows them, through a "blending" process, to upgrade the quality of oil volumes, and, through a "batching" process, to gather in the tanks for shipment by pipeline the quantity and quality of oil specified by the purchaser. RR 7:39-40. Because Midland has no refineries, the oil ultimately finds its way to refineries in Texas or other states through two outgoing pipelines. RR 3:69.

The oil in the Midland tank farm arrives by pipeline or truck and leaves by pipeline. RR 2:86-88; 4:33-35, 41, 51; 6:7-8, 78-80; 7:19-21, 76. Individual barrels of oil ordinarily remain in the tank farms from between less than a day to one week; but on average, between 24 to 36 hours. RR 3:28; 5:46; 7:25. However, the Oil Companies maintain a constant massive amount of oil inventory in the tank farms throughout the year, as outgoing oil is replenished by incoming oil. RR 3:34; 5:44-45; 7:46-47; 8:53. The tank farms are required to maintain certain minimum volumes of oil for safety reasons. 5:43-44. The Oil Companies also maintain additional volumes in the tanks as "working stock," to facilitate prompt shipments to customers. RR 3:26-27, 51-52. At any given time, the oil companies' inventories of oil in the Midland tank farms collectively total around 3 million barrels. D. Ex. 3, 14, 23, 58, 96.

Petitioner Midland Central Appraisal District included on the tax rolls for the tax years 2003 and 2004 an allocable share of each Oil Companies' inventory of oil that was present in the Midland tank farms on January 1 of those years. RR 2:63-78; 9:16-39. The Oil Companies contested taxation of their oil, and following a bench trial, the trial court rendered judgment in their favor. The court of appeals affirmed, concluding that (1) the oil was shielded from taxation by the Commerce Clause of the U.S. Constitution and (2) the oil did not acquire a taxable situs in Midland County because it was in interstate commerce. The Texas Supreme Court denied review.

This case was tried on federal issues from its inception. Note the Findings of Fact and Conclusions of Law of the trial court in Appendix D. Particularly, Conclusions of Law 3 and 6 describe the federal issues tried. Furthermore, also note the Defendant's trial brief at Clerks Record (CR) 217-239, discussing at length the federal issues involved.

The court of appeals' decision squarely rested on its interpretation of the Commerce Clause. Note *BP America*, 282 S.W.3d at 221-24. Appendix A. The issue was, of course, briefed by both parties at the court of appeals. That court, in spite of the prior ruling in *Missouri Gas Energy*, chose to adopt the antiquated interpretation of the dormant Commerce Clause expressed in *Peoples Gas*, thus widening the conflict between Texas and Oklahoma as well as between Texas and federal precedent.

At the petition for review to the Texas Supreme Court, the District raised federal issues. Appendix G. Likewise, the issue of whether the oil was protected from local taxation by the Commerce Clause was raised in the motion for rehearing to the Texas Supreme Court.

REASONS FOR GRANTING THE PETITION

I. Policy overview

The Texas court of appeals rendered a decision that a massive quantity of oil constantly held in inventory in tank farms in Midland is shielded from local taxation under the dormant Commerce Clause because the oil is purportedly "in transit" in interstate commerce. *BP America*, 282 S.W.3d at 224. This Court should exercise its discretionary review for multiple reasons, summarized as follows:

1. The court below has reached a decision on an important question of federal law that has not been, but should be resolved by this Court. Namely, whether a massive quantity of inventory establishes a nexus with the state of its location such as to meet the criteria for local taxation under the *Complete Auto* test, even though individual units thereof may be "in transit," *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The Oklahoma Supreme Court has decided in favor of taxation while the Texas court below has decided against. This Court, noting the importance of the issue, requested the Solicitor General's opinion on the Oklahoma case. She concluded that the Oklahoma Supreme Court ruled correctly. Brief of the U. S. as *Amicus Curiae*, *Missouri Gas Energy v. Schmidt*, No. 08-1458. Review is thus available pursuant to U.S. Sup. Ct. Rule 10(c).

2. Furthermore, the Texas decision is manifestly wrong, being in direct conflict with this Court's precedent, and it creates the unjust result of large corporate citizens being exempted from taxation in one state while subject to taxation in an adjacent state, under no legally distinguishable circumstances. Particularly, in view of Texas' significant economy and volume of case law, the dichotomy of results invites forum shopping by multi-state businesses that will in turn result in economic conflicts between the states. Therefore, this Court has discretionary review under U.S. Sup. Ct. Rule 10(b).

3. The decision in question is effectively the decision the Texas court of last resort, particularly given the similar result in *Peoples Gas, Light, & Coke Co. v Harrison Central Appraisal District*, 270 S.W.3d 208 (Tex. App.—Texarkana 2008, petition denied), which directly conflicts with the Oklahoma Supreme Court's decision in *Missouri Gas Energy*, 234 P.3d 938 (Okla. 2008), *cert. denied*, 130 S.Ct. 1685 (2010) on a very important federal question; namely, whether massive quantities of goods constantly present in a jurisdiction are shielded from local taxes by the dormant Commerce Clause because individual units may be "in transit" in interstate commerce. Though the tax in question is different, the opinion below is also in conflict with *Mississippi State Tax Commission v. Murphy Oil USA, Inc.*, 933 So.2d 285 (Miss. 2006). It is also in conflict with lower appellate court decisions that have become the established

law in Louisiana and Florida. Thus, the Court has discretionary review under U.S. Sup. Ct. Rule 10(b).

4. The Texas court of appeals below found that the oil in question was shielded from local taxation under the dormant Commerce Clause because it was "in transit." Though the court attempted to apply the *Complete Auto* test, the opinion is in diametric conflict with this Court's decisions in *Complete Auto*, 430 U.S. 274 and *DH Holmes Co. v. McNamara*, 486 U.S. 24 (1988). Therefore, this Court has discretionary review under U.S. Sup. Ct. Rule 10(c). At the same time, not only the court below, but many other courts seem to be confused on this point. Note the argument below at 16-19. Therefore, this Court should also exercise discretionary review under U.S. Sup. Ct. Rule 10(c) to settle an important federal question about which the courts below seem to be amply confused.

5. Similarly, another issue needs clarification by this Court: Is the physical presence of the taxpayer by activities in the taxing state necessary to establish nexus? This Court's decision in *Quill v. North Dakota*, 504 U.S. 298 (1992), has been used to support that notion. But, there is ample reason to restrict the application of that doctrine to activities based taxes, not to property taxes. The court below improperly focused on the activities of the taxpayer rather than the presence of the property.

6. These important federal questions also involve massive amounts of local revenue. They are obviously capable of repetition and thus need to be resolved for that reason alone. For example, a short time ago this Court was faced with a petition in *Missouri Gas Energy*, 234 P.3d 938 (Okla. 2008), *cert. denied*, 130 S.Ct. 1685 (2010). Contemporaneously with this petition, a petition is also being filed in *Harrison Central Appraisal District v. Peoples Gas, Light, & Coke Co.*, No. ___, involving the same questions of law and very similar facts. Further, there are personal property *ad valorem* taxes levied in at least 41 states (Appendix F), thus leaving open the possibility of impact of this case in all those states. Other types of state and local taxation are impugned as well. The importance and possibility of recurrence of the issue is further illustrated by the fact that three parties filed amicus brief at the Texas Supreme Court.

   Furthermore, according to the U.S. Energy Information Administration, there are at last report over 240,000,000 barrels of oil in tanks and pipelines in America.[1] Not only that, but the decision below impacts far more than just oil; any inventory in a distribution facility is impacted. Untold litigation will be emboldened by the opinion below as states are encouraged to levy taxes by the result in *Missouri Gas Energy* and the industry is encouraged to contest those taxes

---

[1] U S Energy Information Administration, www.eia doe gov/dnav/pet/pet_stoc_cu_s1_m htm (last visited Dec 8, 2010).

by the result below. Thus, both industry and government will be aided by a quick resolution of these controversies by this Court.

II. Dormant Commerce Clause jurisprudence

This case, obviously, presents the opportunity to interpret the dormant or negative Commerce Clause. That is, the critical issue before this Court is only whether the dormant Commerce Clause prohibits the tax on the oil in question. If it does not, this case should be reversed.

A. Dormant Commerce Clause jurisprudence supports taxing the oil.

There is a considered argument that the dormant Commerce Clause is not a legitimate concept and should be discounted. But, assuming the continued efficacy of the dormant Commerce Clause, that jurisprudence supports the tax before the court.

This Court's jurisprudence regarding the dormant Commerce Clause has morphed through the years from one of interpreting it as a complete ban on local taxation of goods in interstate commerce, *LeLoup v. Port of Mobile*, 127 U.S. 640 (1888), to the modern interpretation of allowing taxation under certain criteria. *See Complete Auto*, 430 U.S. 274. While space does not permit an examination of a long history of the dormant Commerce Clause, suffice it to say that, in times gone by, much litigation was spawned over whether

the good was in interstate commerce to begin with, whether it had come to rest, whether it had come to rest for a business purpose or otherwise, as well as a host of subtle nuances.

However, with its decision in *Complete Auto,* 430 U.S. 274, this Court held that a tax on goods in interstate commerce is valid if it: 1) is applied to an activity or thing with a substantial nexus to the taxing state; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services provided by the state.

The court below found fault only with the first prong; that is, whether the tax was applied to an activity or thing with a substantial nexus to the taxing state. That opinion below errs in finding no nexus and merits grant of petition and reversal.

1. Constant presence of massive quantities

A massive volume of oil inventory exists in scores of tanks located in the tank farms in Midland County, Texas. The capacities of the tank farms are about six million barrels. At any given time, it is likely that approximately three million barrels are present in the tank farms. RR 2:96-100; 5:36-37; 7:24-28; 6:22; 10:25; 15:146, 154, 168, D. Ex. 4, 13. Thus, there is constantly a massive amount of oil in the Midland tank farms. The Oklahoma Supreme Court in *Missouri Gas Energy*, under substantially similar circumstances, found that the continual presence of this massive quantity of hydrocarbons was, in itself, sufficient to establish nexus with the

taxing state. 234 P.3d at 954-57. At this Court's invitation, the Solicitor General indicated her approval of the opinion in *Missouri Gas Energy*. Brief of U. S. as *Amicus Curiae* in *Missouri Gas Energy v. Schmidt*, No. 08-1458 at 21. The Texas Supreme Court made a similar ruling regarding oil in massive amounts of inventory in *Diamond Shamrock Refining & Marketing Co. v. Nueces County Appraisal District*, 876 S.W.2d 298, 303 (Tex. 1994). The court below, however, as well as the court in *Peoples Gas* found differently. *BP America* 282 S.W.3d 215; *Peoples Gas*, 270 S.W.3d 208. Each found that, because the oil or gas was in interstate commerce, the constant presence of massive quantities of the oil or gas did not establish nexus with Texas. *BP America*, 282 S.W.3d at 224; *Peoples Gas*, 270 S.W.3d at 218-19.

But, regardless whether individual units of the oil, or any other product, may come and go with regularity, or even frequently, the constant presence of massive quantities of inventory creates a local presence of that inventory and a constant need for local government services via law enforcement, fire suppression, education of labor force, health services, and the other accoutrements of a civilized society.

If one were to examine the tank farms in Midland, or the gas field near Hallsville, or the gas field in Wood County, Oklahoma, or oil tanks in Cushing, Oklahoma, or any other hydrocarbon storage facility in this country, on any given day one would find the same thing as on every other day of the year: immense, nearly unfathomable, quantities

of oil or gas. Therein lies the difference between oil in the tanks and oil in the pipeline, the taxation of the latter of which the court below so feared. *BP America*, 282. S.W.3d at 224. The four or six inch gathering pipelines span over literally hundreds of miles with minimal quantities of oil or gas in any one spot for a considerable distance. The tank farms or gas reservoir, on the other hand, accumulate enormous quantities of toxic, flammable hydrocarbons in the space of a few hundred acres. That presence of immense quantities of oil or gas creates the need for local government services and adds to the general mass of property in the county without regard to whether any, all, or none of the oil or gas leaves the state or county. Thus, nexus to the locality should be apparent when a massive volume of any good is constantly present in a jurisdiction.

However, this Court has yet to pass on the matter of whether a massive quantity of inventory, constantly present, even though individual units come and go, is sufficient to establish nexus under *Complete Auto*. As noted, the issue is one of broad applicability and capable of frequent repetition. Indeed, there are multiple tank farms across the country (RR 3:98; 5:76-77; 7:96) and untold numbers of distribution warehouses. Regardless how this Court rules, a ruling is needed.

While this Court has not specifically ruled on that point, it has ruled on some similar points. For example, in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), a Japanese company that owned a number of shipping containers used

exclusively in foreign commerce was contesting the power of California to tax those containers. While the containers' port was in Japan, the Court noted in approving the tax that there were containers in California at all times. *Id* at 445-46.

2. "In transit" is inconsequential.

Another issue which needs clarification by this Court is whether the fact that goods may be "in transit" has any efficacy in determining whether nexus exists with the taxing state under the *Complete Auto* analysis. It should be apparent under the *Complete Auto* test that whether a good is "in transit" does not in and of itself defeat the taxability of that good under the dormant Commerce Clause. The business in question in *Complete Auto* was a trucking business. Trucks are by nature "in transit." Furthermore, this Court opined in *DH Holmes* that:

> We recognized [in *Complete Auto*] that, with certain restrictions, interstate commerce may be required to pay its fair share of state taxes. Accordingly, in the present case, it makes little difference for Commerce Clause purposes whether the...[appellant's] catalogues "came to rest" in the mailboxes of its Louisiana customers or whether they were still considered in the stream of interstate commerce. This distinction may be of some importance for other purposes (in determining, for instance, whether a

> "taxable moment" has occurred . . .), but for Commerce Clause analysis it is largely irrelevant.

DH Holmes, 486 U.S. at 30-31. The Solicitor General, in her Brief of the U. S. as *Amicus Curiae* in the case of *Missouri Gas Energy v. Schmidt*, No. 08-1458, concurred and stated that whether a good is in transit has been found by this Court to be "largely irrelevant."

Admittedly, a good that is merely in transit across a state without any further connection with the state, such as a product sitting on a truck that simply rolls across the state's highways, probably has no nexus with the state. But, to claim that because a good is "in transit," it lacks nexus with the taxing state is circular logic. Unless one wants to revert to the tortured analysis of when a good comes to rest for business purposes as opposed to merely facilitate transportation, (as did the court below, *See BP America*, 282 S.W.3d at 222-23) it is probably axiomatic that a good is not in interstate commerce unless it is "in transit." Thus, to apply the "in transit" litmus test as an automatic disqualifier for nexus is to say that if a good is in interstate commerce then it has no nexus and is therefore not taxable by the situs state under the dormant Commerce Clause. Such a reading eviscerates *Complete Auto*.

Nevertheless, the courts below continue to struggle with a continued application of the "in transit" analysis, a struggle which begs for

clarification from this Court. In the decision below, the court's opinion turned on the fact that it found the oil to be "in transit." *BP America*, 282 S.W.3d at 224.

The court of appeals in *Peoples Gas* was likewise fixated on the gas in that case being "in transit." 270 S.W.3d at 215-16. Even in the correctly decided *Missouri Gas Energy* case, the Oklahoma Supreme Court labored over the relevance of the "in transit" nature of the gas, concluding that this Court had not given clear direction on the issue. 234 P.3d at 953-54. The Solicitor General, in her *amicus* brief in *Missouri Gas Energy*, as well noted the want of a definitive ruling from this Court on the matter. Brief of the U.S. as *Amicus Curiae*, No. 08-1458, at 10. Similarly, Professor Hellerstein noted this Court's lack of certain direction on the point. Jerome Hellerstein & Walter Hellerstein, *1 State Taxation* ¶ 4.13[1] (3d ed. 2010).

Other courts, even since the *DH Holmes* decision, have labored with the mistaken notion that the "in transit" status of a good renders it immune from state taxation due to the dormant Commerce Clause. Since the decisions of this Court in *Complete Auto* and in *DH Holmes*, not only have *BP America* and *Peoples Gas*, been decided, but see *Rowan Companies, Inc. v. Louisiana State Tax Commission*, 623 So.2d 159, (La. App. 1 Cir., 1993). Therein, the court opined that the Commerce Clause "prohibits taxation by the states of property which is in transit in interstate commerce." *Id.* at 162. Similarly, the court in *Pelts & Skins, L.L.C. v. Louisiana*

Department of Wildlife and Fisheries, 938 So.2d 1047 (La. App. 1 Cir. 2006) concluded that a tax on the goods in transit would likely be found to violate the commerce clause. *Id.* at 1054-55. "[T]he states may not tax property in transit in interstate commerce." *American Steamship Co. v. Limbach*, 572 N.E.2d 629, 631 (Ohio 1991). "If property is 'actually in transit' to another state, it becomes the subject of interstate commerce, and is exempt from local assessment." *Kentron, Inc. v. State Bd of Tax Com'rs*, 572 N.E.2d 1366, 1372 (Ind. Tax 1991). The "unconditional commitment of property to a common carrier for transportation in regular course to another state or country . . . place[s] it in the stream of interstate or foreign commerce, so as to render it immune from local taxation." *T. A. Operating Corp. v. State Dept. of Revenue*, 767 So.2d 1270, 1273 (Fla. App. 1 Dist. 2000). While not dealing with state taxation, *Predka v. Iowa*, 186 F.3d 1082 (8th Cir. 1999), also evinces a misunderstanding that the fact that a matter is "in transit" is determinative to invoking the Commerce Clause power reserved for the United States Congress. *Id.* at 1084.

Between the decisions of this Court in *Complete Auto* and *DH Holmes* other courts struggled with the concept of the relevance of goods being "in transit." For example, in *Chesapeake and Potomac Telephone Co. of Maryland v. Comptroller of Treasury*, 528 A.2d 536 (Md. Ct. Spec. App. 1987), while deciding in favor of the local tax, the court did so after deciding the goods were no longer in transit. *Id.* at 542-43. The same result and rationale was employed in *Sterling Custom Homes, Inc. v.*

Commissioner of Revenue, 1985 WL 6207 (Minn. Tax 1985). The Louisiana decisions of *United Gas Pipe Line Co. v. Whitman*, 390 So.2d 913 (La. Ct. App. 1980), *writ denied.*, 396 So.2d 928 (La. 1981), and *Mississippi River Transmission Co. v. Simonton*, 442 So.2d 764, 765 (La. Ct. App. 1983), *writ denied.*, 444 So.2d 1240 (La. 1984), discussed below, while reaching correct results, also resorted to pre-*Complete Auto* law, determining that the previously in transit gas had come to rest in Louisiana, and was thus no longer subject to Commerce Clause restrictions.

The Oil Companies and the court of appeals below placed extreme reliance on the "continuity of transit" test to conclude whether the oil in question was in the stream of interstate commerce and thus, erroneously, exempt from local taxation. They borrowed rationale, however, from cases decided not under the Commerce Clause, but under the Import-Export Clause, U.S. Const. art. I, §10, cl. 2. *See, Virginia Indonesia Co. v. Harris County Appraisal Dist.*, 910 S.W.2d 905, 908 (Tex. 1995) *cert. denied,* 518 U.S. 1004 (1996). However, the "continuity of transit" test still makes sense with regard to Import-Export Clause cases because the clause contains an absolute prohibition on taxation of goods in the course of export. Therefore, as this Court has recognized, the "continuity of transit" rationale still has applicability when examining goods in the stream of export, but not for examination of the taxability of goods in interstate commerce. *U.S. v. Int'l Bus. Machines Corp.*, 517 U.S. 843, 851-852 (1996).

The Import-Export Clause, U.S. Const. art. I, § 10, cl. 2, and the Export Clause, U.S. Const. art. I, § 9, cl. 5, contain similar prescriptions against all taxation, whether at the state level or the federal level. The Commerce Clause contains no such prohibition.

The court below specifically weighed the "continuity of transit" analysis as adopted by *Peoples Gas* and as considered by *Missouri Gas Energy* and elected to adopt the outdated *Peoples Gas* approach. Thus, it has added to the dichotomy of case law on the subject. That dichotomy of law, if allowed to persist, will doubtlessly spawn litigation regarding the taxability of any number of types of goods in interstate commerce. In order to resolve this issue before the confusion infects other jurisdictions, this Court should grant certiorari in both *BP America* and *Peoples Gas* and opine conclusively as only this Court can.

3. Conflicts with other states.

a. Oklahoma

As discussed above, the *Missouri Gas Energy* decision of the Oklahoma Supreme Court is in patent conflict with the court of appeals below as well as with the *Peoples Gas* opinion. In all three cases, either oil or gas, largely produced in-state, arrived by truck or pipeline at a massive depot. There it might be traded (RR 3:97; 4:38-40, 43-44, 94), and at some point will move on down the pipeline, perhaps for interstate destinations. The only factual distinction

between the *Missouri Gas Energy* case and the *Peoples Gas* case is the Red River (border between Texas and Oklahoma). And, the Oklahoma Supreme Court recognized the conflict when it specifically criticized the *Peoples Gas* decision. *Missouri Gas Energy*, 234 P.3d at 959, n.84.

This case admittedly involves oil, not gas. But, that hardly seems a fact on which to base a distinction from the *Missouri Gas Energy* decision. It is also true that some of the gas in *Missouri Gas Energy* and *Peoples Gas* stays for a longer time than the oil in Midland is likely to stay. While some gas molecules may come and go quickly, some may stay for months.

It is also true that the gas depots use the term "storage," a term eschewed by the Oil Companies and the court of appeals below, notwithstanding that the reports of the oil's location made to the state of Texas refer to the oil in tanks as in "storage" while the oil in the pipeline as in "transportation." RR P. Ex. 8; D. Ex. 3, 14, 23. And, on that supposed want of storage basis the court of appeals attempted to distinguish *Missouri Gas Energy* as well as *Diamond Shamrock. BP America*, 282 S.W.3d at 221-24. But, the distinction is illusory at best. In the first place, how long a stay constitutes "storage?" If a good is on a shelf for a day waiting delivery then it is stored for a day. The oil in *Diamond Shamrock* was considered "stored" even though it was in the tanks for only 12 to 25 days. *Diamond Shamrock*, 876 S.W.2d at 299. The gas in *Missouri Gas Energy* and *Peoples Gas* may stay for shorter or somewhat longer times. The

point is not, however, how long a particular barrel of oil or mcf of gas or widget may stay at an *entrepot*; the point is that, as explained above, there is a constant presence of the inventory on location in massive quantities. It was that fact on which the *Missouri Gas Energy* decision turned, not how long a particular molecule of gas stayed in the depot or whether the term "storage" was used.

Thus, *Missouri Gas Energy* is at odds with *BP America*. That conflict becomes all the more relevant since the oil that leaves Midland for interstate destinations is likely to go to the next major tank farm in Cushing, Oklahoma. RR 3:68-69. Thus the unresolved conflict between *Missouri Gas Energy* and *BP America* leaves the anomalous result that the oil will be tax exempt in Midland due to the alleged restraints of the Commerce Clause but taxable under the same Commerce Clause when it reaches the tanks in Cushing, Oklahoma. That is neither just, nor consistent, nor rational. Furthermore, the dichotomy lends itself to expansion as other state courts may now follow the Texas cases, noting Texas' expansive body of case law. At this point, only this Court can resolve that conflict.

In the *Missouri Gas Energy* petition for certiorari, the Solicitor General concluded that this Court should decline certiorari for two reasons. One, the Oklahoma Supreme Court ruled correctly. And, two, there was not at that point a conflict between the states. In her Brief of the U.S. as *Amicus Curiae* she noted the non-conforming opinions of the court of appeals herein and in the *Peoples Gas* case but

observed that the Supreme Court of Texas had the cases under review. Brief of U.S. as *Amicus Curiae*, *Missouri Gas Energy v. Schmidt*, No. 08-1458 at 7. Since the Texas Supreme Court denied review, the conflict now exists.

b. Mississippi

In another case irreconcilable with the decision below as well as with the decision in *Peoples Gas,* the Mississippi Supreme Court found sufficient nexus to support taxation under a Commerce Clause challenge regarding petroleum products in tanks in Mississippi which arrived in the state by pipeline, stayed less than five days, and were injected into other pipelines for distribution in and out of the state. *Murphy Oil,* 933 So.2d at 293-94. The tax at issue was a franchise tax, not an *ad valorem* tax, and was based on the sales made in Mississippi. Neither did the court address the matter of the petroleum products being "in transit." But, the case nevertheless involved nearly identical facts to this case, and resulted in a finding of nexus of the products to Mississippi to support taxation. Furthermore, all the Oil Companies sold their oil at the Midland tank farms just as Murphy sold its products at or around the tank farm in Mississippi. RR 5:73-74; 7:76-79, 84-85, D. Ex. 7, 16, 33-55, 75-94. The Mississippi court also referred to the petroleum products as being "stored" though staying for no more than five days in the tanks, a shorter time than the oil in Midland sometimes stays.

c. Louisiana

Two Louisiana decisions, discussed above, *United Gas*, 390 So.2d 913, and *Mississippi River Transmission*, 442 So.2d 764, are also factually identical to *Peoples Gas* and functionally comparable to *BP America*. In each of those cases, gas was piped in from producing fields to a storage field for later delivery out of state via pipeline. The cases were decided under archaic, pre-*Complete Auto* law, finding that the gas had come to rest in Louisiana. *United Gas*, 390 So.2d at 916-17; *Miss. River Transmission*, 442 So.2d at 770. But, the end result is that hydrocarbons in a holding facility are taxable in Louisiana, but not in Texas, with both states' courts citing to Commerce Clause rationale

d. Florida

In *Havill v. Gurley*, 382 So.2d 109 (Fla. Dist. Ct. App. 1980), the court examined whether containerized petroleum products which were brought from out of state to a warehouse in Florida, then shipped back out of state were subject to local *ad valorem* taxation under the Commerce Clause. The appellate court found that nexus existed under *Complete Auto* notwithstanding that the goods were "in transit" in interstate commerce. *Id.* at 111.

4. Activities emphasis is misplaced.

The court of appeals' opinion regarding the want of nexus is erroneous because it focuses on activity rather than property. The property tax in

question is just that: a tax on property, not a tax on activity.

The Texas court's attempt to alter the very nature of the taxes at issue recalls one of the most quotable statements ever to appear in an opinion from this Court, namely: "[a] tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes." *Trinova Corp v. Michigan Department of Treasury*, 498 U.S. 358, 374 (1991) (quoting, Jenkins, *State Taxation of Interstate Commerce*, 27 Tenn. L. Rev. 239, 242 (1960)). Texas' *ad valorem* taxes are measured solely by the value of property. No amount or type activity affects the tax appraisal or the tax assessment. The taxes are exactly what they purport to be: *ad valorem* property taxes. As the Texas court admits, a substantial nexus exists for taxes of this type. As this Court has recognized, the nexus to be establish when a property tax is at issue is nexus with the property. *Polar Tankers, Inc. v. City of Valdez*, 129 S.Ct. 2277, 2284 (2009) citing *Japan Line*, 441 U.S. at 441-45.

Though not cited by the court of appeals, the emphasis on the local activities, or physical presence, of the taxpayer may be argued from *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Therein, the Court was considering a sales tax on goods sent by mail from out of state into North Dakota. The Court reaffirmed in *Quill* that nexus with the taxing state is established by the taxpayer's presence in the taxing state. However, *Quill* concerned a sales tax, not a property tax. Sales taxes are by nature taxes on activities, not properties. Here, as explained

above, nexus with Midland is established by the constant presence of massive quantities of oil in Midland. Thus *Quill*'s application should be limited to activities based taxes, not property taxes. Another petition now pending before this Court, Petition for Writ of Certiorari, *Ashworth L.L.C. v. Department of Revenue, Finance Administration Cabinet, Commonwealth of Kentucky*, No. 10-662, raises this same issue with regard to income taxes. Again, that dichotomy cries for this Court's clarification.

However, even if the court of appeals had properly focused on the activities of the oil companies, it should have, nevertheless, found nexus. The District will defer till later further briefing on that point, however.

5. Scholarly treatise finds fault with *BP America*

One of the foremost resources on state taxation is the treatise by Jerome and Walter Hellerstein. Recently, the treatise noted the poor logic of the court below, commenting on the *BP America* case as follows:

> Although the Oklahoma court's opinion [*Missouri Gas Energy*] reflects the better view of the current state of the law regarding taxes on goods in transit than that reflected in the Texas case [*Peoples Gas*], a subsequent Texas decision [*BP America*] followed the Texas precedent in embracing an

> earlier view of the Commerce Clause restraints . . .
>
> ...the subsequent Texas decision did attempt to reconcile its decision with the Oklahoma decision . . . But the very distinction the Texas court drew reveals the weakness of its reasoning.
>
> The Texas court then went on to find that the *ad valorem* property tax on oil in the county tank farm failed *Complete Auto's* 'substantial nexus' test, because the oil was in transit, a position that seems flatly inconsistent with the U.S. Supreme Court's decision in [*DH*] *Holmes*.
>
> As a practical matter of course, taxing 100% of the oil located in the tank farm on January 1 would result in a fair portion if, as the evidence in the case suggested, 'there is a substantial quantity of the oil that is constantly present in the tanks . . .'

Jerome Hellerstein & Walter Hellerstein, *1 State Taxation* ¶ 4.13[3][a] (3d ed. 2010).

The treatise was equally critical of the court of appeals' decision in *Peoples Gas*. That the treatise is a recognized authority is beyond doubt. It has been cited by this Court with approval on multiple occasions. *See, e.g., MeadWestvaco Corp. v. Ill. Dept.*

of Revenue, 553 U.S. 16, 25 (2008); *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 321 (1998); *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 463 (1995).

6. Nexus from the ground.

The oil this case patently has nexus with the State of Texas. As was noted in the opinion below, it was produced from the ground in Texas. *BP America*, 282 S.W.3d at 219. In fact, the court of appeals even admitted that the oil had nexus with Texas, acknowledging its production in Texas, but concluded that the "activity" being taxed was the ownership of the oil. *Id.* at 224. That is a particularly illogical rationale for at least two reasons. One is that Texas does not levy an *ad valorem* tax on the "activity" of "ownership" but rather on property. *See* Tex. Tax Code § 11.01. That is the nature of any *ad valorem* tax. Second, this Court has recognized that nexus is established with a taxing state by the nature of the presence of the property being taxed. For example, in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617-18 (1981), the court found sufficient nexus between Montana and coal mined there to support a tax thereon, notwithstanding that over 90% of the coal was bound for delivery out of the state.

B. *Complete Auto* is completely met.

Though not addressed by the court of appeals, the tax at issue herein also meets the other three prongs of *Complete Auto*.

First, it is clear that the tax is fairly apportioned, since it only applies to oil that is actually in the tank farms in Midland on the assessment date of January 1. For that same reason, there is no danger of multiple taxation of oil as the court of appeals worried, because the oil, by definition, can only be in one place at one time. Given the January 1 tax assessment date, the oil taxed in Midland is only in Midland.

Furthermore, the tax plainly does not discriminate against interstate commerce. It applies to any and all inventories.

Finally, the tax in question is patently fairly related to the services provided by the state. Extensive testimony at trial indicated that fire, police, law enforcement, health services, and education were provided to the tank farms and those employed in operating them. RR 5:51-54; 6:79-84; 10:66-109. Furthermore, in view of the events of recent months it would be laughable, were it not so serious, to contend that a company like BP America could not experience some accident with its oil that might cause extensive damage requiring the response of local government.[2] And, that the tanks are assessed with property taxes is irrelevant. Empty tanks demand very little in the way of public services. It is the oil in them that creates the need for multiple public services.

---

[2] For an example of what can happen to a tank farm see: YouTube, http://www youtube.com/watch?v=NVzxohzcn18 (last visited Dec. 9, 2010)

III. No independent state law ground exists.

The Oil Companies may argue to this Court that the court of appeals' decision was supported by an adequate state law ground such as to defeat jurisdiction in this Court. After finding the tax invalid under the dormant Commerce Clause, the court of appeals found that because the oil was only temporarily in Midland County, being in interstate commerce, it established no situs for taxation there pursuant to Tex. Tax Code § 21.02. *America* at 224-225. The text of the statute is at Appendix E.

The issue is, of course, governed by this Court's decision in *Michigan v. Long*, 463 U.S. 1032 (1983). Therein, this Court held that it would presume jurisdiction unless the state court opinion plainly states "that it is based on a bona fide separate, adequate, and independent grounds." *Id.* at 1040-1041.

A. The putative state law ground is not adequate.

Texas' jurisdiction to tax is necessarily co-extensive with the power to tax allowed under the federal Constitution. The Texas Constitution mandates that all property be taxed which the state has the power to tax under its own or the federal Constitution. Tex. Const., Art. VIII, § 2; *Dallas County Appraisal Dist. v. L.D. Brinkman & Co., Inc.*, 701 S.W.2d 20, 23 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). Thus, a reversal on the federal grounds

necessitates a reversal on the state law grounds as well, whether under § 11.01 or § 21.02.

B. The court of appeal's ruling on § 21.02 is not independent of its holding on the dormant Commerce Clause.

If the constant presence of a massive quantity of inventory is sufficient to establish nexus with the taxing state under *Complete Auto*, it is more than sufficient to establish situs in Midland County. In other words, if the proper focus for the Court's examination is the constantly present massive inventory of oil, as opposed to the individual barrels that come and go frequently, both nexus and situs are apparent. After all, it is uncontested that the immense quantities of oil are located in no other place than Midland County. That is where the tank farms are.

Under § 21.02 there is situs to tax locally if the property is present more than a temporary period of time. The same standard applies to jurisdiction to tax under Tex. Tax Code § 11.01 which, though not cited by the court of appeals, was cited by the trial court. If the massive quantities of oil that are constantly present, though the constituent units thereof come and go, establish nexus, the same fact indicates that the oil is present for more than a temporary period of time in Midland. And, the Texas Supreme Court has so found. *Diamond Shamrock*, 876 S.W.2d at 303.

Before reaching § 21.02, the court below first found distinction in two cases establishing situs for oil in tanks under virtually identical circumstances by noting that this oil was bound for interstate commerce and thus in transit in interstate commerce while the oil in the other cases was not. *BP America*, 282 S.W.3d at 222. Only after finding that the dormant Commerce Clause exempted the oil from taxation did it proceed to § 21.02. As such, the putative state grounds are so interwoven with the federal issue as to be indistinguishable. As this Court has held, "where the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain." *Enterprise Irrigation Dist. v. Farmers' Mutual Canal Co.*, 243 U.S. 157, 164 (1917).

The legal underpinnings of situs are founded in the Due Process Clause, U.S. Const. amend. XIV, § 1, not the dormant Commerce Clause. *See, Quill Corp. v. N.D.*, 504 U.S. 298, 312 (1992); *Braniff Airways, Inc. v. Neb. State Bd. of Equalization & Assessment*, 347 U.S. 590, 598-599 (1957); *Miller Brothers Co. v. Md.*, 347 U.S. 340, 344-345 (1954). Of the two Constitutional provisions, the Commerce Clause is the more stringent. *See, Quill Corp.*, 504 U.S. at 312-313; *Tax Comm'r of W. Va v. MBNA America Bank*, 640 S.E.2d. 226, 235 (W. Va. 2006); Jerome Hellerstein & Walter Hellerstein, *1 State Taxation* ¶ 6.02 (3d ed. 2010). Thus, a tax that meets the scrutiny of the Commerce Clause will also meet scrutiny under the Due Process Clause

C. There is no plain statement of independent reliance on a state law ground.

The court of appeals' logic in its § 21.02 ruling was premised on its finding that the oil was protected by the dormant Commerce Clause from taxation. After spending nearly the entirety of its opinion discussing the dormant Commerce Clause, it dispatched the § 21.02 argument in two paragraphs without citing any supporting state cases. *BP America*, 282 S.W.3d at 224-225. Its two paragraphs are laced with reference to the oil being in interstate commerce and having no nexus with Texas or Midland County. The opinion never states that its ruling under § 21.02 is an independent ground.

D. The putative state law ground is not a bona- fide issue.

A court should always rule first on narrow issues and state issues before federal Constitutional issues. *Massachusetts v. Upton*, 466 U.S. 727, 735-737 (1984) (Stevens, J. concurring). The court below clearly premised its judgment on the federal dormant Commerce Clause issue. It appends its ruling on § 21.02 as a virtual afterthought, that is explicitly dependent on its finding of want of nexus. *BP America*, 282 S.W.3d at 225.

CONCLUSION AND PRAYER

The District prays that this Court grant writ of certiorari.

Respectfully submitted,

Kirk Swinney
McCREARY VESELKA
BRAGG & ALLEN, P.C.
700 Jeffrey Way, Suite 100
Round Rock, Texas 78665
Telephone: (512) 323-3200
Telecopier: (512) 323-3294
kswinney@mvbalaw.com

APPENDICES

APPENDIX A.
Midland Central Appraisal District v. BP America et al , No. 11-00048 Opinion (11th District Ct. App. Mar. 26, 2009)

IN THE ELEVENTH COURT OF APPEALS AT EASTLAND, TEXAS
[Filed March 26, 2009]

Case No. 07-00048
TC# CV44864 (Consolidated)

MIDLAND CENTRAL APPRAISAL DISTRICT,
Appellant/Cross-Appellee,
v.
BP AMERICA PRODUCTION COMPANY ET AL.
Appellees/Cross-Appellants.

Appeal from the District Court of
Midland County, Texas
John Hyde, District Judge, Presiding

Agued and Submitted
November 6, 2008—Eastland, Texas

Filed March 26, 2009

Before: Justice Wright, Justice McCall, and Justice Strange

Opinion by Chief Justice Jim R. Wright

COUNSEL

Douglas W. Alexander, Alexander Dubose Jones & Townsend, L.L.P., Austin, Texas, for the appellant/cross-appellee

Kirk Swinney, Matthew Tepper, Roy L. Armstrong, McCreary Veselka Bragg & Allen, P.C., Round Rock, Texas, for the appellant/cross-appellee

Laurie Ratliff, Ikard & Golden, P.C., Austin, Texas, for the appellees/cross-appellants

William Ikard, & William W. Kilgarlin, Ikard Wynne LLP, Austin, Texas, for the appellees/cross-appellants

---

OPINION

The issue in this case is whether an *ad valorem* tax may be imposed on crude oil located in Midland County in a tank farm that is an integral part of an interstate, common carrier pipeline system. In its appraisal rolls for 2003 and 2004, Midland Central Appraisal District (MCAD) included oil located in the tank farm on January 1 of the respective years. MCAD allocated ownership of the oil to various shippers, including BP America Production Company; Amerada Hess Trading Company; Chevron USA, Inc.; ChevronTexaco Products Company; ChevronTexaco Global Supply and

Trading Company; TEPPCO Crude Oil LLC; and TEPPCO Crude P/L LLC (hereinafter referred to collectively as the Oil Companies). The Oil Companies properly protested and ultimately brought four separate suits in district court. After consolidating the suits and conducting a nonjury trial, the trial court rendered judgment that the oil was not taxable but denied the Oil Companies' request for attorney's fees. MCAD appeals the trial court's ruling regarding the taxability of the oil, and the Oil Companies appeal the denial of attorney's fees. We affirm.

I. *Issues*

MCAD presents six issues for review. In the first issue, MCAD contends that the trial court erred as a matter of law in determining that the oil is not taxable in Midland County. In the second issue, MCAD contends that the trial court erred in finding that oil had no situs in Midland County. In the third issue, MCAD contends that the trial court erred in holding that the oil was in interstate commerce. In its fourth issue, MCAD challenges the legal and factual sufficiency of several findings of fact and asserts that the trial court erred in considering the oil as individual barrels rather than an aggregate inventory. MCAD argues in its fifth issue that the trial court erred in finding that the tax is not applied to an activity or oil with a substantial nexus to Texas. In its final issue, MCAD asserts that the trial court erred in finding that MCAD's allocation of ownership of the oil was not reasonable.

The Oil Companies present two issues for review. In their first issue, the Oil Companies contend that the trial court erred in denying their request for attorney's fees because the award of attorney's fees was mandated by statute, specifically TEX. TAX CODE ANN. § 42.29 (Vernon 2008). In their second issue, the Oil Companies assert that MCAD waived its challenge to the award of attorney's fees by requesting findings of fact that support the award.

II. *Background Facts*

The record shows that the underlying facts in this case are largely undisputed. ***219** The unchallenged findings of fact indicate that oil at issue in this case was produced mostly in West Texas and a small amount in eastern New Mexico and was injected into the Midland Pipeline System, a spiderweb configuration of interconnecting pipelines covering more than two dozen counties in West Texas and eastern New Mexico. The Midland Pipeline System is an interstate, common carrier pipeline system that is regulated by the Federal Energy Regulatory Commission and is operated by various pipeline companies that are not parties to these proceedings. Upon injection of the subject oil into a pipeline, control and custody was relinquished to the pipeline companies; the oil, being fungible, became part of the common stream of oil.

Oil in the system travels through pipelines in Texas, taking no more than two and one-half weeks, to final destinations at various oil refineries located

in Texas and in other states. During the journey, a large amount of oil passes through the tank farm where the Midland Pipeline System converges. The tank farm functions as an integral part of the Midland Pipeline System and exists to facilitate the transportation of the oil, not to store oil. The oil in the tank farm arrives and exits via the Midland Pipeline System. The time from entry into a tank to exit from a tank is six to seventy-two hours. However, a certain minimum volume of cushion oil is required to be maintained in each tank for safety reasons and to meet emission standards, resulting in the constant presence of a large amount of oil in the tank farm. Blending, batching, or staging of the oil may occur at the tank farm as necessary to facilitate the transmission of the oil through the Midland Pipeline System, but these processes do not interrupt the continuity of transit. The tanks are not used for storage.

Oil is bought, sold, and traded by document transfers irrespective of where the oil may be in the system. These transfers do not alter the movement of the oil or interrupt its in-transit movement to refineries. Upon arrival at a refinery, the oil is assessed and listed for taxation by the local appraisal authorities.[3] Furthermore, *ad valorem* taxes are assessed on the pipelines, tanks, physical assets, and equipment at the tank farm. In 2003 and 2004, those *ad valorem* taxes were timely paid.

---

[3] We note also that a production tax is levied on oil that is produced in Texas. TEX TAX CODE ANN. §202 051 (Vernon 2008)

III. *MCAD's Appeal*

A. Sufficiency of the Challenged Findings.

MCAD challenges several of the trial court's findings regarding the temporariness of the oil in Midland County and in Texas, the continuity of the oil's transit, the ultimate destination of the oil, and the oil's status as being in interstate commerce. MCAD argues in its fourth issue that there is no evidence to support the challenged findings and that the evidence is factually insufficient to support those findings. MCAD also argues in its fourth issue that the trial court erred in considering the oil as individual barrels of oil rather than an oil inventory.

We review sufficiency challenges to a trial court's findings of fact under the same standards that we use to review a jury's findings. *Catalina v. Blasdel,* 881 S.W.2d 295, 297 (Tex.1994); *Anderson v. City of Seven Points,* 806 S.W.2d 791, 794 (Tex.1991). In analyzing a legal sufficiency challenge, we must determine whether the evidence at trial would enable reasonable and fair-minded people to reach the ***220** verdict under review. *City of Keller v. Wilson,* 168 S.W.3d 802, 827 (Tex.2005). We must review the evidence in the light most favorable to the challenged finding, crediting any favorable evidence if a reasonable factfinder could and disregarding any contrary evidence unless a reasonable factfinder could not. *Id.* at 821-22, 827. We may sustain a no-evidence or legal sufficiency challenge only when (1) the record discloses a complete absence of a vital

fact, (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (3) the only evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. *Id.* at 810 (citing Robert W. Calvert, *"No Evidence " and "Insufficient Evidence" Points of Error,* 38 TEX. L.REV. 361, 362-63 (1960)). In analyzing a factual sufficiency challenge, we must consider and weigh all of the evidence and determine whether the evidence in support of a finding is so weak as to be clearly wrong and unjust or whether the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *Dow Chem. Co. v. Francis,* 46 S.W.3d 237, 242 (Tex.2001); *Pool v. Ford Motor Co.,* 715 S.W.2d 629, 635 (Tex.1986); *In re King's Estate,* 150 Tex. 662, 244 S.W.2d 660, 661 (1951). We review a trial court's conclusions of law, including those mislabeled as findings of fact, de novo. *See BMC Software Belgium, N.V. v. Marchand,* 83 S.W.3d 789, 794 (Tex.2002).

At trial, several witnesses, including employees of the pipeline companies, explained that a tank is basically a wide spot in a pipeline and that the tank farm is simply a gathering location of multiple pipelines that bring barrels of oil in at varying rates and varying pressures and allows the oil to be gathered to move on to the next destination. The Oil Companies are not allowed to store oil in the pipeline system. The oil in the tanks is in constant movement: either filling or withdrawing. After reviewing all the evidence, we hold that, although

there is a substantial quantity of oil that is constantly present in the tanks, the trial court's findings regarding the continuity of the oil's transit are supported by legally and factually sufficient evidence.

MCAD also challenges findings regarding the ultimate destination of the oil and the oil's status as being in the stream of interstate commerce. The trial court found that a vast majority of the oil located in the tank farm is sent to refineries located outside of Texas and that less than ten percent of the oil remains in Texas. These findings are supported by testimony showing that the oil passing through the tank farm travels through the pipeline system and can be offloaded at only three refineries in Texas. Testimony showed that the amount of oil offloaded at these three refineries amounts to less than ten percent of the oil that passes through the tank farm in the pipeline system and that "the rest of the oil has to leave the state." After reviewing all of the evidence, we hold that the challenged findings of fact are supported by legally and factually sufficient evidence. To the extent that MCAD's fourth issue challenges the sufficiency of the evidence, it is overruled.

B. Was the Oil Taxable in Midland County?

Unless exempt by law, tangible personal property in Texas is taxable if it is located in Texas for longer than a temporary period, is temporarily located outside Texas but the owner resides in

Texas, or is used continually in Texas. TEX. TAX CODE ANN. § 11.01 (Vernon 2008); *see also* TEX. TAX CODE ANN. § 21.02 (Vernon 2008) (taxable situs in taxing unit). In determining ***221** whether the oil at issue in this case was taxable, we address whether the oil was in the stream of interstate commerce, whether the trial court erred in failing to consider the oil as a constant presence in the tanks rather than individual barrels in transit, and whether the oil had situs in Midland County. We ultimately conclude that the tax violated the Commerce Clause of the United States Constitution, U.S. CONST. art. I, § 8, cl. 3, and that the tax was not valid under Section 21.02(a)(1) due to the temporary period during which the oil was located in Midland County.

1. Interstate Commerce.

The first question is whether the oil had been placed into the stream of interstate commerce. MCAD argues that it had not. Interstate commerce "occurs when goods 'have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey.' " *Va. Indon. Co. v. Harris County Appraisal Dist.*, 910 S.W.2d 905, 908 (Tex.1995) (*VICO*) (citing *Coe v. Errol*, 116 U.S. 517, 527, 6 S.Ct. 475, 29 L.Ed. 715 (1886)).

The trial court found and the uncontroverted evidence indicates that, prior to making its way to the tank farm, the subject oil was injected into a federally regulated, interstate common carrier

pipeline system. Once injected, the oil remained in the pipeline and under the pipeline's control until it reached its ultimate destination, a refinery. The evidence also shows that the tanks in the tank farm are and were an integral part of the interstate pipeline system and that, although the destination of the oil actually in the tanks at the time of the assessment could not be determined, over ninety percent of the oil passing through the tank farm was transported to refineries out of state. *See Eureka Pipe Line Co. v. Hallanan*, 257 U.S. 265, 272, 42 S.Ct. 101, 66 L.Ed. 227 (1921) (stating that a tank in an oil pipeline "may be regarded as a pipe of larger size").

The next question is whether the oil remained in transit in the stream of interstate commerce when it was at the tank farm. MCAD asserts that the subject oil should be viewed as a massive constant presence of oil in the tank farm and that, if so viewed, it cannot be concluded that the oil was in interstate commerce or that it was only temporarily in Midland County. In support of this contention, MCAD relies upon *Diamond Shamrock Refining and Marketing Co. v. Nueces County Appraisal District*, 876 S.W.2d 298 (Tex.1994), and *Exxon Corp. v. San Patricio County Appraisal District*, 822 S.W.2d 269 (Tex.App.-Corpus Christi 1991, writ denied). We find these cases to be factually distinguishable.

In *Diamond Shamrock*, the supreme court held that oil stored in tanks was subject to an *ad valorem* tax where the oil was imported from abroad into Texas, which was its final destination. 876

S.W.2d 298. Upon arriving in Texas, the oil, which was owned by Diamond Shamrock and destined for Diamond Shamrock's refinery in Texas, was offloaded into a storage facility and stored in tanks before being transported to a refinery in another county by pipeline. Although the parties stipulated that the oil at issue was "in transit," the court determined that the situs of each barrel should not be considered because the incidence of the tax imposed was the year-round presence in the storage facility of a large volume of oil belonging to Diamond Shamrock. *Id.* at 300-04. The court in *Diamond Shamrock* specifically limited its holding to foreign goods in transit through only one state that remain in that state. *Id.* at 302, n. 7. Furthermore, the oil at issue in *Diamond Shamrock* ***222** was located in a storage facility, whereas the oil at issue in this case had been injected into interstate common carrier pipelines and was located in tanks that were an integral part of the common carrier pipeline system within the stream of interstate commerce. Even when viewed as a constant presence, the oil at issue in this case, like the massive quantity of oil constantly present within the pipelines themselves, was located in the stream of interstate commerce where it had been commingled with oil from numerous other shippers and was-for the most part-being transported to another state.

In *Exxon,* as in the present case, oil that was located in working tanks was taxed. 822 S.W.2d 269. The court ruled that, although each individual barrel remained in the county for no longer than seventeen days, the oil acquired situs there because Exxon

maintained at all times a massive quantity of oil in the tanks. *Id.* at 272-74. As in *Diamond Shamrock*, however, the oil in *Exxon* was not destined for any location outside the State of Texas. The oil at issue in *Exxon* was transported, refined, and sold in Texas. *Id.* at 272. Nothing in the court's opinion in *Exxon* indicates that interstate commerce was involved.

Subsequent to its opinion in *Diamond Shamrock*, the Texas Supreme Court considered and struck down an *ad valorem* tax assessed on goods that had been placed into the export stream of commerce but were temporarily located in a facility belonging to an independent export packer. *VICO*, 910 S.W.2d at 906-08. Although the court in *VICO* relied upon the Import-Export Clause, U.S. CONST. art. I, § 10, rather than the Commerce Clause to invalidate the tax, the court recognized that the doctrine used to determine whether goods are in transit at the time of taxation applies equally under either clause. *Id.* at 908 & n. 1. The court recognized the year-round presence in the packer's facility of goods belonging to VICO but did not rely on the goods' constant presence as a factor in its determination that the goods remained in transit and in the stream of export. *Id.* at 907-14.

In *VICO*, the goods had been committed to foreign export and were transported to the packer's facility to be checked, approved for import into Indonesia, inspected, packaged, and cleared for shipping. *Id.* at 907, 913-14. The court held that the temporary stoppage of the goods at the packer's facility, which usually took no more than forty-five

days, did not break the continuity of transit and that the goods remained in the stream of export. *Id.* at 907, 912-14. In determining whether the stoppage disrupted the continuity of transit, the court in *VICO* followed Supreme Court precedent and reasoned that it "is the *purpose* of the stoppage that is important." *Id.* at 912 (citing *Champlain Realty Co. v. Town of Brattleboro,* 260 U.S. 366, 376-77, 43 S.Ct. 146, 67 L.Ed. 309 (1922), and *Minnesota v. Blasius,* 290 U.S. 1, 11-12, 54 S.Ct. 34, 78 L.Ed. 131 (1933)). When the stoppage is attributable to a business purpose of the owner, the in-transit status is deemed to have terminated, and the goods are subject to taxation in the jurisdiction where they are stopped. *Id.* In contrast, if the stoppage is a necessity of the journey or for the purpose of safety and convenience in the course of the journey, the stoppage does not interrupt the continuity of transit. *Id.*

In the present case, the "stoppage" was not related to a business purpose of the owner. The evidence and the trial court's findings indicate that, barring any malfunction, oil is delayed for six to seventy-two hours in the tank farm for purposes related to the operation of the pipeline system. Each tank is required to maintain ***223** 8,000 to 10,000 barrels of oil as a cushion for safety and emission reasons. Oil may also be delayed for blending, batching, or staging-operational functions of the pipeline system that are necessary to facilitate the

transmission of the oil.[4] Thus, as in *VICO*, the "stoppage" of the oil did not interrupt the continuity of transit.

We hold that the trial court correctly determined that the oil was in the stream of interstate commerce. The oil had been injected into a common carrier pipeline system and remained in that interstate system at the time of the tax assessment. Any delay at the tank farm was not attributable to the Oil Companies but, rather, was incidental to the transportation of the oil by the common carrier and was necessary for the safe and efficient operation of the pipeline system.

2. Validity of Tax Under Commerce Clause.

Next, we must determine whether the tax on the oil in interstate transit violated the Commerce Clause. The Commerce Clause grants Congress the power to regulate interstate commerce and implicitly prohibits certain state regulation of interstate commercial activity. *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995). However, not all state taxes on interstate commerce are prohibited. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). Pursuant to *Complete Auto*, a

---

[4] Blending is the mixing of oil of low sulfur content (sweet crude) with oil of higher sulfur content (sour crude) Batching keeps oil of different grades separate Staging is the accumulation of sufficient volumes of oil necessary for transmission in the pipeline system.

state tax does not violate the Commerce Clause if it meets a four-pronged test set out by the Court. To be valid, the tax must (1) apply to an activity with a substantial nexus with the taxing state, (2) be fairly apportioned, (3) not discriminate against interstate commerce, and (4) be fairly related to the services provided by the state. *Id.* at 279, 287, 97 S.Ct. 1076; *Vinmar, Inc. v. Harris County Appraisal Dist.*, 947 S.W.2d 554, 555 (Tex.1997). To establish that a state tax is unconstitutional, the taxpayer need only prove that the tax fails one prong of the *Complete Auto* test. *Vinmar,* 947 S.W.2d at 555.

The trial court concluded that the tax violated the Commerce Clause and that the tax did not satisfy the "substantial nexus" requirement of the *Complete Auto* test. The substantial nexus requirement of *Complete Auto* is a means for limiting state burdens on interstate commerce. *Quill Corp. v. North Dakota,* 504 U.S. 298, 313, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992).

In support of their contention regarding substantial nexus, the Oil Companies cite to a recent opinion of the Texarkana Court of Appeals, *Peoples Gas, Light, & Coke Co. v. Harrison Central Appraisal District,* 270 S.W.3d 208 (Tex.App.-Texarkana 2008, pets. filed). In *Peoples,* the court struck down an *ad valorem* tax assessed against the owner of natural gas on gas that had been placed into the stream of interstate commerce and was located in an underground storage facility owned by an interstate pipeline company. The court determined that the tax violated the Commerce

Clause because the gas owner's activities in Texas and its connection to Texas were too tenuous to create a substantial nexus. 270 S.W.3d at 218.

In contrast, MCAD asserts that we should not follow *Peoples* but should instead follow the decision reached by the Supreme Court of Oklahoma in *In re Assessment of Personal Property Taxes Against Missouri Gas Energy, a Division* ***224** *of Southern Union Co.*, No. 103,355, 2008 WL 4648330 (Okla. Oct.21, 2008). In *Missouri Gas*, the court upheld an *ad valorem* tax on gas held in an underground storage facility owned and operated by an interstate, common carrier pipeline. Missouri Gas Energy owned the gas, which was ultimately transported out of state. The Oklahoma court determined that the gas was not merely passing through the county to an out-of-state destination because the large volumes of gas that were stored in the facility for a substantial part of the year were "not in transit in such a way as to invoke the protection of the Commerce Clause." 2008 WL 4648330, at *11.

We find at least one crucial fact of *Missouri Gas* to be distinguishable from the facts of the present case. The crude oil in the present case was not in storage but, rather, was in transit in the stream of interstate commerce. For this same reason, the case at hand presents an even stronger case for a Commerce Clause violation than did the circumstances in *Peoples*.

To comply with the first prong of the *Complete Auto* test, the *ad valorem* tax on the oil in the tank farm must have applied to an activity with a

substantial nexus with Texas. Although the oil itself had a substantial nexus with this state as much of it was produced in this state and some of it was destined for an in-state refinery, the "activity" being taxed had no such nexus. The activity essentially being taxed in this case was the ownership of oil that was present but in transit on January 1 in a tank farm that constituted an integral part of an interstate, common carrier pipeline system.

Furthermore, if the tax in this case is upheld, then *ad valorem* taxes could potentially be levied by any taxing authority on oil in transit but located, at the time of assessment, in the portion of an interstate pipeline system within the boundaries of that taxing authority. The result would be an impermissible multiple burden on interstate commerce. *See Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 170, 74 S.Ct. 396, 98 L.Ed. 583 (1954) (holding that tax on taking of gas into interstate pipeline infringed upon the Commerce Clause and recognizing that such tax would permit a multiple burden upon commerce because other states could impose a tax on the first taking of the same gas in their state). We hold that the tax in the present case does not satisfy the *Complete Auto* test and that it runs afoul of the Commerce Clause.

3. Validity of Tax Pursuant to State Law.

Section 21.02 provides in relevant part that tangible property in Texas is taxable by a taxing unit if "it is located in the unit on January 1 for more

than a temporary period." Section 21.02(a)(1).3 The trial court concluded that the oil was not located in Midland County for longer than a temporary period. We agree.

As discussed above, the record shows that the oil had been injected into an interstate, common carrier pipeline system; ***225** that the oil merely traveled through Midland County in the pipeline system; that any delay of the oil in the tank farm was temporary and was necessary only to facilitate the continued transportation of the oil; and that the tank farm was not used for storage. Although much of the oil had a nexus with Texas in that it was produced in Texas, it had no such nexus with Midland County. The oil was merely transported through Midland County and was only temporarily located in the county. Thus, we hold that the trial court did not err in concluding that the oil had no taxable situs in Midland County.

The tax was not valid under the Commerce Clause or Section 21.02(a)(1). Consequently, MCAD's first, second, third, fourth, and fifth issues are overruled. We need not reach MCAD's sixth issue concerning allocation of ownership. TEX.R.APP. P. 47.1.

IV. *Oil Companies' Appeal*

The Oil Companies appeal the trial court's refusal to award them attorney's fees. In Texas, attorney's fees are recoverable from an opposing party only when authorized by statute or by contract

between the parties. *Travelers Indem. Co. of Conn. v. Mayfield,* 923 S.W.2d 590, 593 (Tex.1996). The Oil Companies assert that attorney's fees were authorized by Section 42.29 of the Tax Code. The trial court entered findings of fact as to the amount of attorney's fees that would be reasonable if recoverable under Section 42.29. The trial court concluded, however, that the Oil Companies were not entitled to attorney's fees under Section 42.29.

Section 42.29 provides that a "property owner who prevails in an appeal to the court under Section 42.25 or 42.26 may be awarded reasonable attorney's fees." TEX. TAX CODE ANN. § 42.25 (Vernon 2008) provides a remedy for an excessive appraisal, entitling the owner to a reduction of the appraised value on the appraisal roll. TEX TAX CODE ANN. § 42.26 (Vernon 2008) provides a remedy for the unequal appraisal of property in relation to the appraised values of other properties. Sections 42.25 and 42.26 do not apply to this case because the Oil Companies did not challenge the appraised value of the oil; they challenged the ability of Midland County to tax the oil. Consequently, since the Oil Companies did not prevail on a claim "under Section 42.25 or 42.26," attorney's fees were not authorized by Section 42.29. If the legislature had intended for attorney's fees to be recoverable in a case of this type, it could have included in its Section 42.29 authorization of attorney's fees an appeal challenging the inclusion of the property on the appraisal roll, the determination of ownership, or the denial of an exemption. The legislature specifically authorized such protests in TEX. TAX CODE ANN. §

41.41(a) (Vernon 2008) (listing nine distinct actions that may be protested by taxpayer, including: excessive value, unequal appraisal, denial of an exemption, ownership, and inclusion on tax roll). The legislature, however, did not authorize attorney's fees for all such protests. Section 42.29 authorizes attorney's fees for only two distinct types of protest: excessive value and unequal appraisal. *Dallas Cent. Appraisal Dist. v. Seven Inv. Co.*, 835 S.W.2d 75, 77-79 (Tex.1992). The Oil Companies' protest cannot be categorized as falling within either of those two. *See id.* The Oil Companies' first issue is overruled.

In the second issue, the Oil Companies assert that MCAD waived any complaint it had to the award of attorney's fees by requesting findings of fact that supported an award of attorney's fees. We disagree. MCAD repeatedly objected to issues related to the prospective award ***226** of attorney's fees, and MCAD did not request any findings of fact that would entitle the Oil Companies to attorney's fees or waive MCAD's objection to such fees. MCAD merely requested that the trial court amend its findings regarding attorney's fees to omit the phrase "recoverable under Tax Code § 42.29." The requested amendments reflected MCAD's continued objection to the award of attorney's fees and continued contention that the fees were not "recoverable." Moreover, MCAD did not ask the trial court to amend Conclusion of Law No. 9, wherein the trial court concluded: "The Oil Companies are not entitled to attorney's fees under Tax Code § 42.29." MCAD did not waive its complaint to the award of attorney's fees. The Oil Companies' second issue is

overruled.

V. *Conclusion*

The judgment of the trial court is affirmed.

JIM R. WRIGHT
CHIEF JUSTICE

March 26, 2009

Panel Consists of: Wright, J.J.,
McCall, Jr., and Strange, J.

APPENDIX B:
Midland Central Appraisal District v. BP America et al., No. 09-0273 Order Denying Petition for Review (Tex. Sup.Ct. Mar. 12, 2010)

IN THE SUPREME COURT OF TEXAS
[Filed March 12, 2010]

Case No. 09-0273
COA#11-07-00048-CV
TC# CV44864 (Consolidated)

MIDLAND CENTRAL APPRAISAL DISTRICT,
Petitioner,
V.
BP AMERICA PRODUCTION COMPANY ET AL.
Respondents.

ORDER DENYING PETITION FOR REVIEW

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

APPENDIX C:
Midland Central Appraisal District v. BP America et al., No. 09-0273 Order Denying Motion for Rehearing (Tex. Sup. Ct. Oct. 1, 2010)

IN THE SUPREME COURT OF TEXAS
[Filed October 1, 2010]

Case No. 09-0273
COA#11-07-00048-CV
TC# CV44864 (Consolidated)

MIDLAND CENTRAL APPRAISAL DISTRICT,
Petitioner,
v.
BP AMERICA PRODUCTION COMPANY ET AL.
Respondents.

ORDER DENYING MOTION FOR REHEARING

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

APPENDIX D:
BP America et al., v. *Midland Central Appraisal District* No. CV-44864 (Consolidated) Findings of Fact (238th Dist. Ct. Jan. 23, 2007)

IN THE DISTRICT COURT OF
MIDLAND COUNTY STATE OF TEXAS
[Filed January 23, 2007]

Case No. CV-44864 (Consolidated)

BP AMERICA PRODUCTION COMPANY ET AL.
Plaintiffs,
V.

MIDLAND CENTRAL APPRAISAL DISTRICT,
Defendant.

FINDINGS OF FACT

1. The property at issue ("subject oil") is all crude oil located in the tank farms in Midland County ("Midland Tank farm") listed on the Midland Central Appraisal District's Appraisal roll for tax years 2003 and 2004 in the Plaintiffs' ("Oil Companies") names.

2. The Oil Companies are shippers who move oil from a receipt point to a delivery point.

3. The pipeline systems through which the subject oil flowed are the Plains Pipeline System, the Mobil//Centurion Pipeline System, the Teppco Crude Pipeline System and the Chevron mesa Pipe Line System (Collectively "Midland Pipeline System").

4. Before tax year 2003, the Midland Central Appraisal District ("MCAD") did not list or appraise the Oil Companies' oil, located in the Midland Pipeline System or in its tank farms.

5. The Midland Pipeline System is a spider web configuration of interconnecting pipelines covering more than two dozen counties in West Texas and Eastern New Mexico.

6. The Midland Pipeline System through which the subject oil flowed is an interstate FERC-regulated, common carrier pipeline system.

7. The majority of the subject oil is produced in Texas and is injected into the Midland Pipeline System at various receiving points in Texas. A small amount is produced and injected in New Mexico.

8. Once injected into the Midland Pipeline System, the subject oil becomes part of the common stream of oil.

9. The Midland Pipeline System accommodates oil flow into and out of Midland on an hourly basis.

10. Once injected into the Midland Pipeline System, the Oil Companies relinquish control of the subject oil to the Midland Pipeline System's pipeline companies ("Pipeline Companies") and the subject oil is in the Pipeline Companies' custody and control.

11. Once injected into the Midland Pipeline System, the Oil Companies have a right to withdraw amounts of oil, but have no control over the Pipeline Companies' physical movement of the common stream of oil.

12. The majority of the oil refineries that are the subject oil's final destination are outside of Texas.

13. On its journey to final destinations at oil refineries, the subject oil moves under pressure through the Midland Pipeline System into the Midland Tank Farm.

14. While present in Midland County, the subject oil remains in the Midland Pipeline system. None of the subject oil is removed from the Midland Pipeline System or tanks in Midland County.

15. The movement of the subject oil in the Midland Pipeline System is continuous and does not cease from its injection at the various receipt points into the Midland Pipeline System until it reaches its destination at a refinery.

16. The subject oil is never in Midland County for longer than a temporary period.

17. Once injected into the Midland Pipeline System, the Oil Companies' oil is not removed from its in-transit journey until delivery at a refinery.

18. The Midland Pipeline System converges at the Midland Tank Farm located in Midland County.

19. The Midland Tank Farm functions as an integral part of the Midland Pipeline System.

20. Oil in the Midland Pipeline System arrives at the tanks and exits the tanks through interstate pipelines moving the oil to refineries.

21. The tanks at the Midland Tank Farm exist to facilitate the transportation of crude oil. The tanks at the Midland Tank Farm are not used for storage of oil.

22. For safety reasons and to meet emission standards, the Pipeline Companies require a minimum amount of oil to be maintained in each tank to assure that the tank roof at all times floats or rests on the surface of the oil within the tank.

23. The minimum amount of oil in each tank in use remains constant but varies by tank size, ranging from 8,000 to 10,000 barrels of oil. At any particular time, several hundred thousand barrels of oil may be located in the tanks.

24. The duration the subject oil remains in a tank in Midland Count ranges from 6 to 72 hours.

25. Blending, batching and staging of the subject oil are operational functions of the Midland Pipeline System that are necessary to facilitate the transmission of the subject oil. They do not interrupt the continuity of transit of the subject oil.

26. "Blending" is the mixing of oil. Low sulfur content "sweet crude" is mixed with higher sulfur content "sour crude" in the tanks or transmission lines exiting a tank to achieve a preferred sulfur concentration for transmission to a particular refinery. Nothing is added to or extracted from the subject oil during blending.

27. "Batching" allows different grades of oil (sweet and sour) to remain separate to avoid unintentional mixing.

29. "Staging" is the accumulation of sufficient volumes of oil in the tanks for transmission of oil in the Midland Pipeline system.

30. Any accumulation of the subject oil in the tanks at the Midland Tank Farm is solely to maintain a minimum tank volume incidental to transmission of the oil and for safety reasons. Any accumulation of the subject oil in the tanks is not to facilitate storage of the subject oil.

31. The tanks at the Midland Tank Farm are not used for the storage of the subject oil.

32. The slowing of the subject oil's movement at the Midland tank Farm does not interrupt the continuity of transit.

33. Any delay of the subject oil in Midland County due to blending, batching or staging is to facilitate the continued transportation of the subject oil on its interstate movement.

34. Once injected into the Midland Pipeline System, the subject oil is not removed from its in-transit journey until delivered to a refinery.

35. The movement of subject oil does not cease from injection into the Midland Pipeline System at the point of origin until it reaches its destination at a refinery.

36. The subject oil is not processed, altered or stored while flowing in the Midland Pipeline System.

37. Transportation of the subject oil terminates at refinery destinations.

38. Certain quantities of the subject oil are delivered to refineries in Big Spring, Texas, Wichita Falls, Texas and Longview, Texas. Unless off-loaded at one of these three Texas refineries, the subject oil remains in transit to out-of-state refineries.

39. Ninety-percent of the subject oil in the Midland Tank Farm on January 1, 2003 and on January 1, 2004 left Texas for refineries in other states.

40. Once off-loaded at a refinery, the subject oil is taxable by the local appraisal authorities.

41. Less than 10 percent of the subject oil in Midland tank Farm on January 1, 2003 and on January 1, 2004 remained in the state of Texas.

42. The duration the subject oil remains in a pipeline system moving through Texas to an out of state refinery is no more than approximately two and half weeks.

43. The subject oil is bought, sold and traded by document transfers along the entire journey through the Midland Pipeline System.

44. The transfer of title does not alter the movement of the subject oil.

45. Sales or trades of the subject oil can be accomplished anywhere within the entire pipeline system.

46. Buying, trading and selling of the subject oil does not stop or interrupt the subject oil's continued, in-transit movement in the Midland Pipeline System to a refinery.

47. Buying, trading and selling of the subject oil does not remove oil from the Midland Pipeline System or the Midland Tank Farm because the trading is accomplished through a complex accrual-type accounting system. An owner of oil may sell more barrels of oil than it actually ships through the Midland pipeline System for a particular month. In

that situation, the owner has a negative balance for the month similar to an account payable that is to be discharged at a later date.

48. No documentation can determine the location of a specific barrel of the subject oil or its ownership within the entire pipeline system.

49. No document or calculation can be used to determine the location at any particular time of a specific barrel of the subject oil or its ownership within the Midland Pipeline System or the Midland Tank Farm.

50. It is impossible to trace or identify individual barrels of the subject oil.

51. MCAD's allocation of the volumes of the subject oil to the particular Oil Companies was not reasonably tied to the percentage of the Oil Companies' ownership.

52. The Oil Companies have no ownership interest in any specific individual barrels of the subject oil in the Midland Pipeline System or in the Midland Tank Farm.

53. The subject oil's presence in Texas and in Midland County is purely transitory.

54. During tax years 2003 and 2004, the subject oil was not located in Texas for longer than a temporary period.

55. During tax years 2003 and 2004, the subject oil was not located in Midland County for longer than a temporary period.

56. Any temporary interruptions of the subject oil were for transportation purposes and did not remove the subject oil from interstate commerce.

57. During the tax years at issue, *ad valorem* taxes have been assessed and timely paid on the pipelines, tanks, physical assets and equipment located at the Midland Tank Farm.

58. Upon arrival at a refinery, the subject oil is assessed and listed for taxation by the local appraisal authorities.

59. The Oil Companies' attorneys' fees recoverable under Tax Code §42.29 were reasonable.

60. Plaintiff Amerada Hess Trading Company's attorneys' fees recoverable under Tax Code §42.29 for the prosecution of the Chapter 42 appeal for tax years 2003 and 2004 would be $34,067.80.

61. Plaintiff BP America Production Company's attorneys' fees recoverable under Tax Code §42.29 for the prosecution of the Chapter 42 appeal for tax year 2003 and 2004 would be $34,067.80.

62. Plaintiffs Chevron USA and ChevronTexaco Trading Company's attorneys' fees recoverable under Tax Code §42.29 for the prosecution of the Chapter

42 appeal for tax years 2003 and 2004 would be $51,995.14.

63. Plaintiffs Teppco Crude Oil LLC and Teppco Crude Pipeline LLC's attorneys' fees recoverable under Tax Code §42.29 for the prosecution of the Chapter 42 appeal for tax years 2003 and 2004 2would be $33,376.38.

CONCLUSIONS OF LAW

1. The subject oil is not taxable in Midland County.

2. The location of the subject oil in Midland County is transitory, During tax years 2003 and 2004, the subject oil was not located in this State for longer than a temporary period as required to establish jurisdiction under Tax Code §11.01(c)(1) and thus MCAD does not have jurisdiction to tax the subject oil. Accordingly, the subject oil was not taxable.

3. Even if jurisdiction to tax were established, during tax years 2003 and 2004, the subject oil was exempt from *ad valorem* taxation because one injected into FERC-regulated, common-carrier pipelines, the subject oil has entered the stream of interstate commerce and was not removed from its in-transit journey until delivery at a refinery. Accordingly, the subject oil was exempt under the United States Constitution's Commerce Clause and Tax Code §11.12 and thus not taxable.

4. The subject oil had not acquired taxable situs in Midland County during tax years 2003 and 2004 because it was not located in Midland County for longer than a temporary period as required by Tax Code §21.02(a)(1). Accordingly, the subject oil was not taxable.

5. MCAD's allocation of volumes of oil to the Oil Companies was arbitrary and is unrelated to actual location or ownership of the subject oil.

6. Because the Oil Companies' activities in Midland County do not have a substantial nexus to the State or to Midland County, the taxes assessed on the subject oil do not satisfy the first requirement of *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977).

7. Constant presence of the subject oil in Midland County does not establish the State's jurisdiction to tax or taxable situs in Midland County.

8. The Oil Companies' attorneys' fees calculated under Tax Code §42.29 are reasonable.

9. The Oil Companies are not entitled to attorneys' fees under Tax Code §42.29.

Signed on the 23rd day of January, 2007.

APPENDIX E:
Tex. Tax Code Ann. § 21.02

V.T.C.A., Tax Code § 21.02

§ 21.02(a). Tangible Personal Property Generally

Effective: September 1, 2009

(a) Except as provided by Subsections (b) and (e) and by Sections 21.021, 21.04, and 21.05, tangible personal property is taxable by a taxing unit if:
(1) it is located in the unit on January 1 for more than a temporary period;
(2) it normally is located in the unit, even though it is outside the unit on January 1, if it is outside the unit only temporarily;
(3) it normally is returned to the unit between uses elsewhere and is not located in any one place for more than a temporary period; or
(4) the owner resides (for property not used for business purposes) or maintains the owner's principal place of business in this state (for property used for business purposes) in the unit and the property is taxable in this state but does not have a taxable situs pursuant to Subdivisions (1) through (3) of this subsection.

APPENDIX F:
States with personal property taxes

Alabama	ALA. CODE §40-7-1
Alaska	ALASKA STAT. §43.56.210
Arizona	ARIZ. REV. STATE. ANN. §42-11002
Arkansas	ARK. CODE ANN. §26-3-201
California	CAL. REV. & TAX. CODE §201
Colorado	COLO. REV. STATE. ANN. §39-1-101
Connecticut	CONN. GEN. STAT. ANN. §12-41
Florida	FLA. STAT. ANN §196.001
Georgia	GA. CODE ANN. §48-5-3
Idaho	IDAHO CODE ANN. §63-301
Indiana	IND. CODE ANN. §6-1.1-2-1
Kentucky	KY. REV. STAT. ANN. §132.190
Louisiana	LA. REV. STAT. ANN. §47:1951
Maine	ME. REV. STAT. ANN. TIT. 36, §502
Maryland	MD. CODE ANN., TAX-PROP. §6-101
Massachusetts	MASS. GEN. LAWS ANN. CH. 59, §2
Michigan	MICH. COMP. LAWS ANN. §211.1
Minnesota	MINN. STAT. ANN. §272.01
Mississippi	MISS. CODE ANN. § 27-35-7
Montana	MONT. COE ANN. §15-6-101
Nebraska	NEB. REV. STAT. ANN §77-201
Nevada	NEV. REV. STAT. ANN. §361.045
New Hampshire	N.H. REV. STAT. ANN. §72.8
New Jersey	N.J. STAT. ANN. §54:4-1
New Mexico	N.M. STAT. ANN. §7-36-27
North Carolina	N.C. GEN. STAT. ANN. §105-274
Oklahoma	OKLA. STAT. ANN. TIT. 68, §2804

Oregon	OR. REV. STAT. ANN. §307.030
Rhode Island	R.I. GEN. LAWS §44-3-1
South Carolina	S.C. CODE ANN. §12-37-210
Tennessee	TENN. CODE ANN. §67-5-101
Texas	TEX. TAX CODE ANN. §11.01
Utah	UTAH CODE ANN. §59-2-104
Vermont	VT. STAT. ANN. TIT. 32, §3002
Virginia	VA. CODE ANN. §58.1-3500

APPENDIX G:
Midland Central Appraisal District v. BP America et al., No. 09-0273 Petition for Review (Tex. Sup. Ct. May 20, 2009)

IN THE SUPREME COURT OF TEXAS
[Filed May 20, 2009]

Case No. 09-0273
COA#11-07-00048-CV
TC# CV44864 (Consolidated)

MIDLAND CENTRAL APPRAISAL DISTRICT,
Petitioner,
v.
BP AMERICA PRODUCTION COMPANY ET AL.
Respondents.

PETITION FOR REVIEW

Douglas W. Alexander
State Bar No. 00992350
Amy Warr
State Bar No. 00795708
Roger Townsend
State Bar No. 20167699
ALEXANDER DUBOS & TOWNSEND LLP
Bank of America Center
515 Congress Avenue, Suite 2350

Kirk Swinney
State Bar No. 19588400
MCCREARY VESELKA BRAGG & ALLEN, P.C.
700 Jeffrey Way, Suite 100
Round Rock, Texas 78665
Tel.: (512) 323-3200
Fax: (512) 323-3294

Austin, Texas 78701
Tel.: (512) 482-9300
Fax: (512) 482-9303

COUNSEL FOR PETITIONER
IDENTITY OF PARTIES AND COUNSEL
Appellee/Petitioner:
Midland Central Appraisal District

Petitioner's counsel at various stages of trial and appellate proceedings

Douglas W. Alexander
ALEXANDER DUBOSE JONES & TOWNSEND, L.L.P.
515 Congress Ave., Suite 1720
Austin, Texas 78701

Roger Townsend
ALEXANDER DUBOS JONES & TOWNSEND, L.L.P.
1844 Harvard Street
Houston, Texas 77008

Kirk Swinney
Roy Armstrong
Matthew Tepper
MCCREARY VESELKA BRAGG & ALLEN, P.C.
700 Jeffrey Way, Suite 100
Round Rock, Texas 78665

Raul A. Gonzalez
LAW OFFICE OF RAUL A. GONZALEZ
10511 River Plantation Dr.
Austin, Texas 78747

Frederick Bostwick
BEARD KULTGEN BROPHY
BOSTWICK DICKSON & SQUIRES
5400 Bosque Blvd., Suite 301
Waco, Texas 76710

Matt J. Morrison
HARRISON DAVIS STEAKLEY, P.C.
5 Ritchie Road
Waco, Texas 76712

Appellees/Respondents

BP America Production Company, Amerada Hess Trading Company, Chevron USA, Inc., ChevronTexaco Products Company, ChevronTexaco Global Supply and Trading Company

Counsel for this Group of Respondents

Laurie Ratliff
IKARD & GOLDEN, P.C.
400 West 15th Street, Suite 975
Austin, Texas 78701

Lynne Liberato
HAYNES AND BOONE, LLP
1221 McKinney, Suite 2100
Houston, Texas 77010-2007

Rodney W. Satterwhite
STUBBEMAN, MCRAE, SEALY,
LAUGHLIN & BROWDER, INC.
Fasken Center, Tower Two
550 West Texas Avenue, Suite 800

P.O. Box 1540
Midland, Texas 79702

Appellees/Respondents
TEPPCO Crude Oil LLC, and TEPPCO Crude P/L LLC

Counsel for this Group of Respondents
William Ikard
William W. Kilgarlin
Peter J. Hageman
IKARD WYNNE L.P.
515 Congress Ave., Suite 1320
Austin, Texas 78701

Jeffrey F. Nadalo
EPCO, Inc.
1100 Louisiana St., Suite 1534
Houston, Texas 77002

TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL.....i
TABLE OF CONTENTS.....iii
INDEX OF AUTHORITIES.....v
STATEMENT OF THE CASE vi
STATEMENT OF JURISDICTION.....vi
ISSUES PRESENTED.....vi

1. Regardless of whether the oil is in interstate commerce, under the U.S. Supreme Court's *Complete Auto* test does the Commerce Clause shield from

State taxation massive inventories of oil that are continuously present in a tank farm in Texas?
2. Do massive inventories of oil that are continuously present in a Midland tank farm acquire a taxable situs in Midland County?
3. Was the oil at issue in transit in interstate commerce? (Unbriefed)

STATEMENT OF FACTS.....1
SUMMARY OF THE ARGUMENT.....3
ARGUMENT.....4

I. This Court should grant review because this case presents an important, recurring issue of constitutional law

II. The Oil Companies' massive inventories of oil in the Midland tank farm are taxable

A. The court of appeals erroneously concluded that the tax of issue fails the first prong of the *Complete Auto* test

1. Under *Diamond Shamrock*, the property being taxed has a "substantial nexus" with Midland County, Texas

2. A tank is not a pipeline

3. Whether the oil is "in transit" in interstate commerce is not dispositive of the Commerce Clause inquiry

4. There is no danger of multiple taxation

B. The court of appeals erred in concluding that the massive inventories of the Oil Companies' oil were only "temporarily" located in Midland County and, therefore, acquired no taxable situs there

PRAYER.....15
CERTIFICATE OF SERVICE.....17
APPENDICES
Court of Appeals' Opinion and Judgment.....1
Final Judgment of the Trial Court.....2
Trial Court's Findings of Fact and Conclusions of Law.....3

INDEX OF AUTHORITIES

Cases

Allied-Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768 (1992).....6
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).....3-6, 10
D.H. Holmes Co. v. McNamara, 486 U.S. 24 (1988).....11
Diamond Shamrock Ref. & Mktg. v. Nueces County Appraisal Dist., 876 S.W.2d 298 (Tex. 1994).....1, 3, 4, 6-8,11, 14
Exxon Corp. v. San Patricio County, 822 S.W.2d 269 (Tex. App. –Corpus Christi 1991,

writ denied).....7, 14, 15
In re Assessment of Pers. Prop. Taxes Against Missouri Gas Energy, --- P.3d. ---, 2008 WL 4648330 (Okla. Oct. 21, 2008).....1, 11
Midland Cent. Appraisal Dist. V. BP America Prod. Co., --- S.W.3d ---, 2009 SL 780456 (Tex. App. – Eastland Mar. 26, 2009, pet. Filed) .....vi, 1, 2, 6, 8, 10, 11, 13, 14
Quill Corp. v. North Dakota, 504 U.S. 298 (1992).....5
United States v. Int'l Business Machines Corp., 517 U.S. 843 (1996).....12, 13
Virginia Indonesia Co. v. Harris County Appraisal Dist., 910 S.W.2d 905 (Tex. 1995), *cert. denied,* 518 U.S. 1004 (1996).....12

Rules and Statutes

TEX. R. APP. P. 56.1.....4
TEX. TAX CODE § 21.02.....14

STATEMENT OF THE CASE

Nature of the Case:	Suit over whether Commerce Clause shield s from State taxation large inventories of Respondent Oil Companies' oil that are continuously present year-round in a tank farm in Midland, regardless of whether the oil is in interstate commerce.
Trial Court:	Hon. John G. Hyde, 238th District

	Court, Midland County, Texas
Trial Court's Disposition:	Rules that Midland Central Appraisal District has no authority to assess taxes on Respondents' oil (Appendix 3)
Court of Appeals:	Eastland Court of Appeals; Chief Justice Wright, joined by Justices McCall and Strange. *Midland Cent. Appraisal Dist. v. BP America Production Co.*,–SW.3d.–, 2009 SL 780456 (Tex. App.–Eastland Mar. 26, 2009, pet. Filed) (Appendix 1)
Court of Appeals' Disposition:	Affirmed.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this case under Government Code Section 22.001(a)(6) because this case presents an important issue of constitutional law regarding the taxability of goods in interstate commerce under the Commerce Clause, which is similar to the constitutional issue presented to this Court in another pending proceedings. *See* No. 09-0053, *Harrison County Appraisal District v. The Peoples Gas, Light and Coke Company.*

ISSUES PRESENTED

1. Regardless of whether the oil is in interstate commerce, under the U.S. Supreme Court's *Complete Auto* test does the Commerce Clause shield from State taxation massive inventories of oil that are continuously present in a tank farm in Texas.

2. Do massive inventories of oil that are continuously present in a Midland tank farm acquire a taxable situs in Midland County?

3. Was the oil at issue in transit in interstate commerce? (Unbriefed)

TO THE HONORABLE SUPREME COURT OF TEXAS:

In this case, the Court is presented a constitutional issue regarding the taxability of massive inventories of oil in Texas: **Regardless of whether the oil is in interstate commerce, under the U.S. Supreme Court's *Complete Auto* test does the Commerce Clause shield from State taxation massive inventories of oil that is continuously present in a tank farm in Texas?** This Court was recently presented a similar constitutional issue regarding the taxability of a massive inventory of natural gas in underground storage in Texas. *See* No. 09-0053, *Harrison County appraisal District v. The Peoples Gas, Light and*

Coke Company, Pet. at v. This Court should grant review in both proceedings because both decisions conflict with the Oklahoma Supreme Court's decision *In re Assessment of Personal Property Taxes Against Missouri Gas Energy,* --- P.3d. ---, 2008 WL 4648330 (Okla. Oct. 21, 2008). Answering the issue presented in this case will also resolve the interstate-commerce issue that was expressly left open by this Court in *Diamond Shamrock Ref. & Mktg. v. Nueces County Appraisal Dist.,* 876 S.W.2d 298, 302 n.7 (Tex. 1994).

STATEMENT OF FACTS

The court of appeals correctly stated that "the underlying facts in this case are largely undisputed." *BP America,* 2009 WL 780456, at *1.

Respondents are "Oil Companies,"[5] each of which owned a massive inventory of crude oil during the tax years 2003 and 2004 that was continuously present in the four tank farms in Midland (collectively, "the Midland tank farm"). RR 3/93-94; D. Ex. 2, 7, 15, 16, 19, 20, 27-29, 33-54, 75-92. Midland is the only marketing center for oil in Texas. RR 5/76; 7/39, 96. The Midland tank farm facilitates the Oil Companies' marketing activities—it allows them, through a "blending" process, to upgrade the quality of oil volumes, and, through a

---

[5] BP America Production Company, Amerada Hess Trading Company, Chevron USA, Inc, Chevron Texaco Products Company, ChevronTexaco Global Supply and Trading Company, TEPPCO Crude Oil, LLC, and TEPPCO Crude P/L LLC.

"batching" process, to gather in the tanks for shipment by pipeline the quantity and quality of oil specified by the purchaser. RR 7/39-40. Because Midland has no refineries, the oil ultimately finds its way to refineries in Texas or other states. RR 3/69.

The oil in the Midland tank farm arrives by pipeline or truck and leaves by pipeline. RR 2/86-88; 4/33-35, 41, 51; 6/7-8, 78-80; 7/19-21, 76. Individual barrels of oil ordinarily remain in the tank farm from between less than a day to one week—on average, between 24 to 36 hours.[6] RR 3/28; 5/46; 7/25. However, massive inventories of the Oil Companies' oil are continuously present in the tank farm throughout the year, as outgoing oil is replenished by incoming oil. RR 3/34; 5/44-45; 7/46-47; 8/53. The tank farms are required to maintain certain minimum volumes of oil for safety reasons. 5/43-44. The Oil Companies also maintain additional volumes in the tanks as "working stock," to facilitate prompt shipments to customers. RR 3/26-27, 51-52. At any given time, the Oil Companies' inventories of oil in the Midland tank farm collectively total around 3 million barrels. D. Ex. 3, 14, 23, 58, 96.

---

[6] The court of appeals stated in its background facts "The time from entry into a tank to exit from a tank is six to seventy-two hours." *Midland Cent. Appraisal Dist. V. BP America Production Co.*, ---S W 3d ---, 2009 WL 780456, at *2 (Tex App. –Eastland Mar. 26, 2009, pet, filed). It is not clear from the record how the court of appeals arrived at these figures, but the District will not quibble with them

Petitioner Midland Central Appraisal District included on the tax rolls for the tax years 2003 and 2004 an allocable share of each of the Oil Companies' inventories of oil that were present in the Midland tank farm on January 1 of those years. RR 2/63-78; 9/16-39. The Oil Companies contested taxation of their oil, and, following a bench trial, the trial court rendered judgment in their favor. App. 2. The court of appeals affirmed, concluding that (1) the oil was shielded from taxation by the Commerce Clause of the U.S. Constitution, and (2) the oil did not acquire a taxable situs in Midland County because it was present there for only a "temporary" period. App. 1. The petition followed.

SUMMARY OF THE ARGUMENT

Regardless of whether Respondent Oil Companies' oil is in interstate commerce while in the Midland tank farm, taxation of the oil is permissible under the Commerce Clause because all four prongs of the U.S. Supreme Court's test are satisfied. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The court of appeals focused exclusively on the first prong, erroneously concluding that the tax failed to pass the test because it did not apply to an "activity" with a "substantial nexus" with Texas. Under *Diamond Shamrock Ref. & Mktg. v. Nueces County Appraisal Dist.*, 876 S.W.2d 298 (Tex. 1994), the "substantial nexus" prong is satisfied because massive inventories of the Oil Companies' oil are continuously present in the Midland tank farm throughout the year.

As *Diamond Shamrock* makes clear, the proper focus for the Commerce Clause inquiry is on the *inventories* of oil that are continuously present in the tank farm, not on *individual barrels* of oil that enter and exit the tank farm. Although individual barrels may remain in the tank farm for a relatively short period of time, that is immaterial. Throughout the year, millions of barrels of oil are continuously present in the tank farm. It is those continuously present, massive inventories that create a "substantial nexus" with Texas.

For a similar reason, the court of appeals' conclusion that the oil did not acquire a taxable situs in Midland County is erroneous. Because massive inventories of oil were continuously present in the Midland tank farm during the tax years in question, those inventories acquired a taxable situs in Midland County. Again, the proper focus is on inventories, not individual barrels.

ARGUMENT

I. This Court should grant review because this case presents an important, recurring issue of constitutional law.

By its prior decision in *Diamond Shamrock*, this Court has already made clear that the issue of the taxability of large volumes of oil in a tank farm in Texas is jurisprudentially important. *See* 876 S.W.2d 298. In that case, the Court rejected the oil company's argument that the oil in the tank farm was not taxable. However, the Court expressly left open the question whether the result would be the

same in a case, like this one, in which we assume that the property is in interstate commerce. *Id.* At 302 n.7. This is the right time to decide this open question because lower courts are being asked to confront it and need the Court's guidance. The Texarkana Court of Appeals recently addressed a similar issue, and its decision has been challenged in this Court. *See* No. 09-0053, *Harrison County Appraisal District v. The Peoples Gas, Light and Coke Company.* The Court should grant both cases and decide the important, related constitutional questions. *See* TEX. R. APP. P. 56.1(a)(4).

II. The Oil Companies' massive inventories of oil in the Midland tank farm are taxable.

A. The court of appeals erroneously concluded that the tax at issue fails the first prong of the *Complete Auto* test.

A little over 30 years ago, the U.S. Supreme Court issued its watershed decision in *Complete Auto,* which resolved the confusion created by competing lines of decisions concerning the taxability of goods in interstate commerce. *See* 430 U.S. at 279. One line of cases established a *per se* bar, "holding that a tax on the 'privilege' of engaging in an activity in the State may not be applied to an activity that is part of interstate commerce." *Id.* At 278. Another line of cases permitted taxation, "stating that '[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state

tax burden even though it increases the cost of doing the business.'" *Id.* At 279.

Complete Auto overruled the first line of decisions. *See* 430 U.S. at 279. The Court thereby rejected the notion that "interstate commerce should enjoy a sort of 'free trade' immunity from state taxation." *Id. at 278.* The Court instead embraced the philosophy that "interstate commerce may be made to pay its way." *Id.* 281.

After *Complete Auto,* even if property is in interstate commerce, that property can be taxed if the tax satisfied a four-prong test: "when the tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Id.* At 279. After *Complete Auto,* courts frequently decline to grapple with whether the property in question is in interstate commerce, which often requires a cumbersome, hair-splitting analysis. Instead, these courts simply *assume,* for purposes of their decision, that the property *is* in interstate commerce, and evaluate the tax under *Complete Auto.* If the tax satisfies that test, whether the property is in interstate commerce is immaterial because, regardless, "[the Court] will sustain [the] tax against a Commerce Clause challenge." *Quill Corp. v. North Dakota,* 504 U.S. 298, 311 (1992). This is the approach taken by the *Complete Auto* Court itself, *see* 430 U.S. at 276 n.4, and the approach taken in this petition.

The Eastland Court of Appeals applied only the first prong of the *Complete Auto* test, concluding that the tax failed because it did not apply to an "activity" with a "substantial nexus" with Texas. *See Midland,* 2009 WL 780456 at *7. Although the District is prepared to demonstrate on full briefing that the tax at issue satisfies all four prongs of the *Complete Auto* test, because the court of appeals confined its discussion to the first prong, this petition will likewise address only that prong.

1. Under *Diamond Shamrock,* the property being taxed has a "substantial nexus" with Midland County, Texas.

The first prong of the *Complete Auto* test requires that the tax be "applied to an activity with a substantial nexus with the taxing State." *Complete Auto,* 430 U.S. at 279. There must be only "some definite link, some minimum connection between a *state* and the . . .*property*. . .it seeks to tax." *Allied-Signal, Inc. v. Dir., Civ. Of Taxation,* 504 U.S. 768, 777 (1992) (emphasis added). *Property*—massive inventories of oil owned by the Oil Companies and located in the Midland tank farm—is what the District seeks to tax here. There is a "definite link" and far more than "some minimum connection" between that "property" and the "state"—Texas. Day in and day out throughout the year, massive inventories of the Oil Companies' oil—the "property" sought to be taxed—can be found in tanks at the tank farm in Midland, Texas.

In *Diamond Shamrock*, an oil company similarly contested *ad valorem* taxation of inventories of its oil in tanks. 876 S.W.2d at 299. The company argued that because its oil was "in transit"—held in the tanks for a maximum of 12 to 25.3 days—both the Import-Export Clause and Commerce Clause precluded taxation. *Id.* The case did *not* involve property in interstate commerce. *Id.* Nonetheless, the Court applied the *Complete Auto* test in evaluating the company's Commerce Clause challenge because the oil in question was shipped from foreign sources. *Id.* At 299, 301. When a state tax is imposed on foreign commerce, a Commerce Clause challenge to the tax is analyzed under both the *Complete Auto* test plus an additional two-prong test. *Id.* At 301. Thus, this Court's analysis of the *Complete Auto* test in *Diamond Shamrock* is applicable here.

Diamond Shamrock supports the District's position. First a general matter, the mere fact that goods are "in transit" is not dispositive of the Commerce Clause question. Even if they are in transit they may still be taxable. *Id.* At 302. It depends on "the circumstances which make the goods 'in transit." *Id.* "For instance, if oil in tanks on trucks merely passed through Nueces County without stopping, it would be 'in transit' in a way that would cause it to have little or no nexus with the county." *Id.*

The Court went on to explain that "under other circumstances, as in this case, there can be sufficient nexus to support a tax even if goods are

technically 'in transit." *Id.* The Court concluded that the nexus requirement is satisfied when, as in this case, a large quantity of the taxpayer's oil is present year-round in the taxing jurisdiction:

> Here, Diamond Shamrock, argues that "[t]he incidence of the tax sought to be imposed is merely the oil's passing through—actual movement through—Nueces County." This argument is only persuasive, however, if one considers each barrel of oil separately. Instead, under *Exxon [Corp. v. San Patricio County,* 822 S.W.2d 269 (Tex. App.—Corpus Christi 1991, writ denied)], the incidence of the tax sought to be imposed is the year-round presence of a large quantity of Diamond Shamrock's oil at rest in Nueces County, which receives government services. We hold that these facts satisfy the first and fourth nexus prongs of *Complete Auto,* and that no interference with foreign commerce is demonstrated in this case. Therefore, the tax here does not violate the Commerce Clause.

Id. at 303.

Thus, a "substantial nexus" is established when "there is large quantity of [the taxpayer's] oil at rest in [the taxing jurisdiction], which receives government services." That is precisely what is involved in this case. If "one considers each barrel of oil separately," the result would be different here, as it would have been in *Diamond Shamrock.* The evidence in this case shows that *individual barrels* of oil do not stay in the Midland tank farm for very long—only 24 to 36 hours on average, RR 3/28—but

that is *not* the criteria by which "substantial nexus" is evaluated under *Diamond Shamrock*.

If one were to go out to the Midland tank farm at any time during the year and peer into one of the tanks, one would see an enormous quantity of oil. That oil would look and smell much like the oil in the tanks in *Diamond Shamrock*. And it would be just as flammable, making necessary the protections afforded by local governmental services. Whether individual barrels of oil remained in the Midland tank farm for 24 to 36 hours or 24 to 36 minutes is immaterial. Just as the oil in the tanks in *Diamond Shamrock* had a "substantial nexus" with Texas (even through the goods were technically "in transit"), so, too, the massive inventories of oil present year round in the Midland tank farm have a "substantial nexus" with Texas, regardless of any "in transit" status. Thus, the first prong of the *Complete Auto* test is satisfied and the court of appeals erred in concluding otherwise.

2. A tank is not a pipeline.

The court of appeals feel prey to the Oil Companies' argument that a tank in a tank farm is essentially just a "wide spot in a pipeline." *See Midland*, 2009 WL 780456 at *3. But this Court has indicated that tanks and pipelines are different: "Oil passing through a county without stopping, in pipelines" is not taxable, *Diamond Shamrock*, 876 S.W.2d at 304, whereas a "year-round presence of a large quantity of [a taxpayer's] oil" in tanks is taxable, even if individual barrels regularly enter

the tanks and exit by pipeline "in transit" to another location, *id.* At 303. In short, a tank is a tank, and a pipeline is a pipeline. Because this case involves tanks, as in *Diamond Shamrock*, the result should be the same.

This distinction makes sense. It would unduly burden interstate commerce if, for instance, multiple counties in Texas could tax bulk shipments of oil that merely passed without stopping through their jurisdictions in a pipeline on its way to another state. However, taxing oil inventories that are continuously present in a massive tank farm such as the one in Midland—which serves the only market center for oil in Texas—does not present the same burden on interstate commerce. Here, because the tank farm is located in a single county, there is no danger of multiple taxation of the inventories located there on January 1. To the contrary, allowing the Oil Companies to avoid paying taxes on their oil in the Midland tank farm means that other property owners in Midland with inventories of goods—such as Mom-and-Pop grocery stores—must disproportionately shoulder the tax burden. The inherent unfairness is manifest when one considers that oil in a tank farm—particularly one the colossal size of the one in Midland—places far greater demands on local governmental services than does a small store.

The grocery store analogy is helpful to understanding how a tax on an inventory of goods works. A bunch of bananas may come and go from the grocer's shelves in a matter of hours, but so long

as the bananas were present in the store on January 1 of a given tax year, when the *ad valorem* tax "snapshot" was taken, they formed part of the collective inventory subject to taxation. RR 9/62-63. In the same way, an individual barrel of oil may come and go from the Midland tank farm within 24 to 36 hours, but so long as it was present in the tank farm on January 1, when the *ad valorem* tax "snapshot" was taken, it formed part of the collective inventory subject to taxation. Thus, just as one need not determine precisely how many days, ours or minutes a bunch of bananas remained a part of the inventory in the grocery store, so, too, one need not determine how long an individual barrel of oil remained a part of the inventory in the tank farm. The key is that on January 1 of the tax years in question, when the *ad valorem* "snapshot" was taken, both the grocery store and the tank farm held substantial inventories of goods subject to taxation.

The court of appeals suggests that there is no unfairness to local taxing authorities by allowing the Oil Companies to escape their tax obligations because "*ad valorem* taxes are assessed on the pipelines, tanks, physical assets, and equipment at the tank farm." *Midland,* 2009 WL 780456 at *3. But just because the Oil Companies and/or other companies own other property in the tank farm that is taxed does not mean that the oil should be exempt. It is the ***oil*** in the tank farm, moreover, that creates the need for fire protection and other governmental services. If the tanks were empty, there would be no fire danger. Because the oil creates need for governmental services, the reluctant Oil Companies

here should "be made to pay [their] way," *Complete Auto,* 430 U.S. at 281, just like the reluctant oil company in *Diamond Shamrock* was made to pay its way. This is the fair result and, under *Complete Auto,* the Commerce Clause poses no obstacle.

3. Whether the oil is "in transit" in interstate commerce is not dispositive of the Commerce Clause inquiry.

Much of the court of appeals' analysis is devoted to determining whether the oil was "in transit" in interstate commerce while it was in the Midland tank farm. *See Midland,* 2009 WL 780456 at *4-6. While that analysis is germane to the question of whether Commerce Clause inquiry was *triggered at all* under the circumstances of this case (an issue preserved but not briefed in this petition), it is not dispositive of the merits—whether the oil is shielded from taxation *even if it is* "in transit" in interstate commerce. Nonetheless, it is apparent from the court of appeals' analysis that is erroneously attached controlling significance to the "in transit" point in deciding the entire Commerce Clause question. *See Id.* at *7. That incorrect analysis is confusing and further reason that the Court should grant this case.

In *Diamond Shamrock,* the parties actually ***stipulated*** that the oil was ***"in transit"*** while it was in the tanks in Nueces County. *See Diamond Shamrock,* 876 S.W.2d at 300. Despite the oil's in transit" status, however, this Court rejected the oil company's argument that this was sufficient to

defeat the "substantial nexus" prong of the *Complete Auto* test:

> Diamond Shamrock argues that the tax here cannot pass the first and fourth prongs of the *Complete Auto* test because the goods are "in transit." We disagree.

Id. at 301. Although this Court did not hold that the result would necessarily be the same in a case involving goods in interstate commerce, the Court expressed substantial doubt that the "in transit" status of goods is dispositive under modern Commerce Clause analysis:

> Our holding today is limited to foreign goods "in transit" through only one state, which remain in that state. **Even as to goods in interstate commerce,** however, **the question of whether Diamond Shamrock's "in transit" argument has any remaining validity under the modern Commerce Clause analysis is questionable,** at least as to goods which have entered the state of their final destination.

Id. at 302 n.7 (emphasis added). Although this court did not definitively resolve the issue in *Diamond Shamrock,* it correctly noted that the U.S. Supreme Court "rejected what amounted to an 'in transit' argument" in *D.H. Holmes,* a case involving goods in

interstate commerce. *Id.* (citing *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 30 (1988)).

In its recent *Missouri Gas* decision, the Oklahoma Supreme Court resolved the question left open by this Court in *Diamond Shamrock*. *See In re Assessment of personal Property Taxes Against Missouri Gas Energy*, 2008 SL 4648330 at *10 (holding that "even if [the taxpayer's] storage gas is in transit in interstate commerce, that does not automatically mean that a tax levied against it would contravene the Commerce Clause.") The court of appeals' decision here is in conflict with *Missouri Gas* because the court of appeals attaches controlling significances to the "in transit" status of the oil. As this Court has recognized, that goods are "in transit" remains dispositive in the context of goods in the stream of *export* under the **Import-Export Clause.** *See Virginia Indonesia Co. v. Harris County Appraisal Dist.*, 910 S.W.2d 905, 911 (Tex. 1995), *cert. denied*, 518 U.S. 1004 (1996) (concluding that "by explicitly articulating an exception for in-transit goods, *Michelin [Tire Corp. v. Wages*, 423 U.S. 276 (1976)] appears to preserve bright-line immunity for goods in the stream of export.") The instant case, however, does not involve the Import-Export Clause.

Whether goods are in "export transit" also remains dispositive under the **Export Clause.** *See United States v. International Business Machines Corp.*, 517 U.S. 843, 863 (1996) ("We conclude that the Export Clause does not permit assessment of nondiscriminatory federal taxes on goods in export transit.") In *IBM*, the Supreme Court made clear

that modern Commerce Clause analysis is substantially different from Export Clause analysis due to the textual disparities between the two clauses:

> Our rejection in *Complete Auto* of much of our early dormant Commerce Clause jurisprudence did not, however, signal a similar rejection of our Export Clause cases. Our decades-long struggle over the meaning of the nontextual negative command of the dormant Commerce Clause does not lead to the conclusion that our interpretation of the textual command of the Export Clause is equally fluid. **At one time, the Court may have thought that the dormant Commerce Clause required a strict ban on state taxation of interstate commerce, but the text did not require that view. The text of the Export Clause, on the other hand, expressly prohibits Congress from laying any tax or duty on exports.** These textual disparities strongly suggest that shifts in the Court's view of the scope of the dormant Commerce Clause should not, and indeed cannot, govern our interpretation of the Export Clause.

Id. at 851-52 (emphasis added). This holding in *IBM* illustrates how the court of appeals' decision in this case is based upon outdated Commerce Clause

analysis that is comparable to the analysis that remains applicable in cases, unlike this one, involving the Import-Export Clause or the Export Clause. In sum, although there remains a strict ban on the taxation of goods "in transit" in the stream of export, there no longer is a strict ban on the taxation of goods "in transit" in interstate commerce. This Court should grant review to embrace the modern approach to Commerce Clause analysis adopted by the Oklahoma Supreme Court in *Missouri Gas*. That approach is consistent with the analysis adopted by this Court in *Diamond Shamrock* and inconsistent with the analysis adopted by the court of appeals here.

4. There is no danger of multiple taxation.

Finally, the court of appeals concluded that imposing a tax on the Oil Companies' oil in Midland under the circumstances of this case could "potentially" create a danger of "an impermissible multiple burden on interstate commerce":

> Furthermore, if the tax in this case is upheld, then *ad valorem* taxes could potentially be levied by any taxing authority on oil in transit but located, at the time of assessment, in the portion of an interstate pipeline system within the boundaries of that taxing authority. The result would be an impermissible multiple burden on interstate commerce.

Midland, 2009 SL 780456 at *7. The court's speculation about this "potential" danger is meritless. On January 1 of any given tax year, the Oil Companies' inventories of oil in the Midland tank farm are located *only* in Midland and, hence, are taxable *only* there.

To illustrate the point, assume, hypothetically, that after Oil Company X's oil leaves Midland, it is shipped by pipeline to a tank farm in Cushing, Oklahoma. On January 1 of a particular year, Oil Company X owns 10,000 barrels of oil in the Midland tank farm and another 10,000 barrels of oil in the Cushing tank farm. Under this hypothetical, all 20,000 barrels would be subject to state taxation, but only half (10,000 barrels) would be subject to taxation by the Midland authorities and the other half (10,000 barrels) by the Cushing authorities. Under *Diamond Shamrock*, the oil in the pipeline between Midland and Cushing would not be taxable. 876 S.W.2d at 304. This scenario creates a "multiple burden" to Oil Company X only in the sense that it would be required to pay its fair share of the local tax on its oil in two different jurisdictions where it simultaneously owned massive inventories of oil. However, there is nothing "impermissible" about that. The same oil is not being taxed twice—Midland and Cushing are each merely receiving tax revenue to which they are justly entitled for property owned by Oil Company X in their respective jurisdictions.

B. The court of appeals erred in concluding that the massive inventories of the Oil Companies' oil were only "temporarily" located in Midland County and, therefore, acquired no taxable situs there.

Section 21.02(a)(1) of the Texas Tax Code provides that "tangible personal property is taxable by a taxing unit if it is located in the unit on January 1 for more than a temporary period." TEX. TAX CODE §21.02(a)(1). The court of appeals concluded that the oil did not acquire a taxable situs in Midland County because "[t]he oil was merely transported through Midland County and was only temporarily located in the county." *Midland,* 2009 SL 780456 at *7. A comparable conclusion was rejected in *Exxon Corp. v. San Patricio County Appraisal Dist.,* 822 S.W.2d 269 (Tex. App.--Corpus Christi 1991, writ denied), a case relied upon heavily by this Court in *Diamond Shamrock. See* 876 S.W.2d at 303-04.

Exxon involved the taxability of oil in seventeen tanks located in San Patricio County. The taxpayer oil company there, likewise citing section 21.02 of the Texas Tax Code, made the same argument the court of appeals embraced here: "Exxon submits the theory that each barrel of oil appraised on January 1, 1988 remained only *temporarily* in, and was merely *being transported through,* the County and therefore could not have attained situs there for tax purposes." *Exxon,* 822 S.W.2d at 271 (emphasis added). The *Exxon* court rejected this argument, making clear that the focus should *not* be on *individual barrels* of oil:

> **We do not agree that when determining whether a large quantity of oil is to be taxed we should consider the situs of each individual barrel separately.** The parties stipulated and the trial court found that Exxon maintained over 400,000 net barrels of crude oil in the County at all times in 1987 and 1999. The fact that each individual barrel does not remain in the County for more than seventeen days, but rather flows sporadically through the working tanks, is inconsequential.

Id. at 272 (emphasis added). Instead, the focus should be on the massive inventories of oil that are continuously present in the tanks:

> **[B]ecause Exxon held a quantity of over 400,000 barrels of oil in San Patricio County in seventeen tanks at all times, a massive quantity was located in the County throughout 1987 and 1988 for more than a temporary period. That the particular oil present on January 1, 1988, shortly left the county is not determinative.**

Id. at 272-73 (emphasis added). This holding is applicable here. Because the Oil Companies "held a quantity of [around 3 million] barrels of oil in [the

Midland tank farm] at all times, a massive quantity was located in the County throughout [2003] and [2004] for more than a temporary period. That the particular oil present on January 1, [2004] shortly left the county is not determinative." Hence, the oil acquired taxable situs in Midland County.

PRAYER

Because neither the Commerce Clause not the Texas Tax Code precludes the tax at issue, this Court should grant review, reverse the judgment of the court of appeals, and render judgment that the Oil Companies' oil is subject to taxation in Midland County.

Respectfully submitted,

ALEXANDER DUBOSE JONES &
TOWNSEND, L.L.P.
515 Congress Ave., Suite 1720
Austin, Texas 78701
Telephone: (512) 482-9301
Telecopier: (512) 482-9303

By: /s/Douglas W. Alexander
Douglas W. Alexander
State Bar no. 00992350
Amy Warr
State Bar No. 00795708

Roger Townsend
State Bar No. 20167699
ALEXANDER DUBOS JONES &
TOWNSEND LLP

1844 Harvard Street
Houston, Texas 77008
Telephone: (713) 523-2358
Telecopier: (713) 522-4553

Kirk Swinney
State Bar No. 19588400
Roy Armstrong
State Bar No. 013235555
McCreary Veselka Bragg &
Allen, P.C.
700 Jeffrey Way, Suite 100
Round Rock, Texas 78665
Telephone: (512) 323-3200
Telecopier: (512) 323-3294

COUNSEL FOR PETITIONER MIDLAND CENTRAL APPRAISAL DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Petition for Review was served upon the foregoing counsel of record via U.S. Mail, on May 20, 2009.

Laurie Ratliff
Ikard & Golden, P.C.
400 West 15th street,
Suite 975
Austin, Texas 78701

Lynne Liberato
Haynes and Boone, L.L.P.

William Ikard
William W. Kilgarlin
Peter J. Hageman
Ikard & Wynne, L.L.P.
515 Congress Avenue,
Suite 1320
Austin, Texas 78701

One Houston Center
1221 McKinney, Suite
2100
Houston, Texas 77010

Rodney Satterwhite
STUBBEMAN MCRAE SEALY
LAUGHLIN & BROWDER,
INC.
Fasken center, Tower Two
550 West Texas Avenue,
Suite 800
P.O. Box 1540
Midland, Texas 79702

Counsel for BP America Production Company, Amerada Hess Trading Company, Chevron USA, Inc., ChevronTexaco Products Company, ChevronTexaco Global Supply and Trading Company

Jeffery F. Nadalo
EPCO, Inc.
1100 Louisiana St.,
Suite 1534
Houston, Texas 77002

Counsel for TEPPCO Crude Oil LLC, and TEPPCO Crude P/L LLC

/s/Douglas W. Alexander
Douglas W. Alexander

183

(5)

Supreme Court, U.S.
FILED
MAR 11 2011
OFFICE OF THE CLERK

No. 10-890

In The Supreme Court of The United States

MIDLAND CENTRAL APPRAISAL DISTRICT,
Petitioner,

v.

BP AMERICA PRODUCTION CO., *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Texas Court of Appeals, Eleventh Appellate District

BRIEF IN OPPOSITION

RAY ALBRECHT
EPCO, INC.
1100 Louisiana
Houston, TX 77002
(713) 381-8380

WILLIAM IKARD
Counsel of Record
WILLIAM W. KILGARLIN
J. JORDAN HAEDICKE
IKARD WYNNE LLP
515 Congress Ave.
Suite 1320
Austin, TX 78701
(512) 275-7880
bill@ikardwynne.com

Counsel for TEPPCO Crude Oil LLC and TEPPCO Crude P/L LLC Respondents

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTION PRESENTED

Whether this Court lacks jurisdiction to grant this Petition for Writ of Certiorari involving an attempt to overturn Texas' courts invalidating a tax on oil temporarily located in Texas and Midland County.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner is Midland Central Appraisal District. The Respondents are BP America Production Co., Amerada Hess Trading Company, Chevron USA, Inc., ChevronTexaco Products Company, ChevronTexaco Global Supply and Trading Company, TEPPCO Crude Oil LLC and TEPPCO Crude P/L LLC.

Pursuant to Sup. Ct. R. 29.6, respondents TEPPCO Crude Oil LLC and TEPPCO Crude P/L LLC state that their parent company is Enterprise Products Partners L.P. and that no other publicly held company owns 10% or more of these respondents' stock.[1]

---

[1] Effective March 24, 2010, TEPPCO Crude Oil LLC is now Enterprise Crude Oil LLC and TEPPCO Crude P/L LLC is now Enterprise Crude P/L LLC

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

WHY NO JURISDICTION EXISTS 1

STATE ACTION 1

COUNTERSTATEMENT 2

ARGUMENT 5

I. The Texas Courts Invalidated the Tax Based on State Law 5

II. Opinion and Judgment Based on Adequate, Independent State Grounds, So No Jurisdiction Exists 10

III. Court of Appeals' Ruling on Texas Property Tax Code § 21.02 is Independent of its Writing on the Dormant Commerce Clause 13

CONCLUSION 15

APPENDIX A:

Midland Central Appraisal District v. BP America et al., No. 07-00048 Opinion and Judgment (11th Dist. Ct. App. March 26, 2009) A-1

APPENDIX B:

BP America et al., v. Midland Central Appraisal District No. CV-44864 (Consolidated) Judgment (238th Judicial District Court Dec. 22, 2006) A-22

APPENDIX C:

TEX TAX CODE § 11.01 ..... A-26

APPENDIX D:

TEX TAX CODE § 11.12 ..... A-28

TABLE OF AUTHORITIES

Cases

Abie State Bank v. Weaver, 282 U.S. 765 (1931)..... 11

Aransas County Appraisal Dist. v. Patterson-UTI-Drilling (South) LP, LLLP, No. 13-04-502-CV, 2005 Tex. App. LEXIS 7033 (Tex.App.-- Corpus Christi Aug. 26, 2005, no pet.)(mem. op., not designated for publication)..... 9

Arizona v. Johnson, 129 S.Ct. 781 (2009) 1

Berea College v. Kentucky, 211 U.S. 45 (1908)..... 5

Coleman v. Thompson, 501 U.S. 722 (1991) 1, 2, 13

Diamond Shamrock Ref. and Mktg. Co. v. Nueces County Appraisal District, 876 S.W.2d 298 (Tex. 1994)..... 9

Eustis v. Bolles, 150 U.S. 361 (1893)..... 5

Fairchild Aircraft, Inc. v. Bexar Appraisal Dist., 47 S.W.3d 577 (Tex.App.—San Antonio 2001, *pet. denied*)..... 8

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 5

General Motors Corp. v. Romein, 503 U.S. 181 (1992)..... 5

Harris v. Reed, 489 U.S. 255 (1989) 1, 12

Herb v. Pitcairn, 324 U.S. 117 (1945)..... 11

In re B.L.D., 113 S.W.3d 340 (Tex. 2003)..... 14

Lambrix v. Singletary, 520 U.S. 518 (1997)..... 2, 6, 14

Michigan v. Long, 463 U.S. 1032 (1983) 1, 4, 12

Midland Central Appraisal District v. BP America Production Company et al., 282 S.W.3d 215 (Tex.App.—Eastland 2009, *pet. denied*)..... 3-4

Milkovich v. Lorain Journal Co., 497 U.S. 1 (2009) 1

Murdock v. Memphis, 87 U.S. 590 (1875) 5
Ohio v. Robinette, 519 U.S. 33 (1996) 1
Pratt & Whitney Canada, Inc. v. McLennan County Appraisal Dist., 927 S.W.2d 641 (Tex.App. — Waco 1996, *writ denied*) 9
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 5
Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204 (1946) 5
Sochor v. Florida, 504 U.S. 527 (1992) 6
VanDevender v. Woods, 222 S.W.3d 430 (Tex. 2007) 6, 13, 14
Watts v. Indiana, 338 U.S. 49 (1949) 14
Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977). 11

Constitutional Provision

Tex. Const., Art. VIII, § 1(b) 8

Statutes

TEX. TAX CODE § 11.01 ..... *passim*
TEX TAX CODE § 11.12 3
TEX TAX CODE § 21.02 ..... *passim*

Treatises and Other

Chemerinsky, Erwin, *Federal Jurisdiction*, 4th Ed., 2003 2
16B Wright, Miller & Cooper, Jurisdiction 2d §§ 4025-4028 11

INTRODUCTION

The instant Petition for Writ of Certiorari is a continuation of a nine year dispute concerning Midland Central Appraisal District's ("MCAD") ability to list and appraise for property tax purposes crude oil which is located in Texas and Midland County for no more than a temporary period. Through those years, the involvement of three different courts has narrowed the issues to the question of whether the oil is taxable under Texas Property Tax Code §§11.01 and 21.02 ("Tax Code"), and incidentally addressed is taxability under the Commerce Clause of the United States Constitution.

WHY NO JURISDICTION EXISTS

This Court has held that it does not have jurisdiction in a case that has been decided on independent and adequate state grounds. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) ("*Long*"); *See also, Arizona v. Johnson*, 129 S.Ct. 781 (2009); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (2009); *Ohio v. Robinette*, 519 U.S. 33, 33-37 (1996); *Coleman v. Thompson*, 501 U.S. 722 (1991) ("*Coleman*"); *Harris v. Reed* 489 U.S. 255, 261 n. 7 (1989). Throughout the Texas court proceedings, this case has been decided on independent and adequate state grounds; therefore, this Court does not have jurisdiction and should not grant certiorari.

STATE ACTION

The final judgment of the state trial court recites that "[t]he Court renders judgment pursuant to Texas Tax Code section 42.24" and "[i]t is, therefore, ordered, adjudged and decreed that

Plaintiffs' property that is the subject of this lawsuit is not taxable during tax years 2003 and 2004 pursuant to Texas Tax Code sec. 11.01." C.R., 269, 271.

The Texas Court of Appeals affirmed the judgment of the trial court and the Supreme Court of Texas denied the MCAD's Petition for Review. The fact that the court of appeals addressed points of error raised by the MCAD, as it should, and denied them, in no way alters the sole basis for its affirming the trial court judgment, which was Tax Code provisions. A recent opinion of this Court, *Lambrix v. Singletary*, 520 U.S. 518, 522 (1997), restating language from *Coleman*, 501 U.S. at 722 is dispositive, pronouncing "this Court 'will not review a question of federal law decided by a state court if the decision of that court rests on a state ground that is independent of the federal question and adequate to support the judgment'." The Court cannot hear the case if the Court's reversal of the federal law ruling will not alter the result because the state court's decision as to state law will mandate the same outcome. Chemerinsky, *Federal Jurisdiction*, 4th Ed., 2003, p. 686.

COUNTERSTATEMENT

In 2003 for the first time in over seventy years, Petitioner MCAD listed on its appraisal roll crude oil flowing through a common-carrier pipeline system traversing Midland County, some of which MCAD alleged was owned by the TEPPCO Crude Oil LLC and TEPPCO Crude P/L LLC (jointly "TEPPCO") Respondents. *See* R.R., vol. 2 at 64: 11-

14. The oil was held to be only temporarily in Texas and Midland County, thus not taxable under the Tax Code. TEPPCO and other Respondents contested the listing because: (1) the oil is transitory and located only temporarily in the state, so it is not subject to the state's jurisdiction to tax under section 11.01 of the Tax Code; (2) similarly, because the oil is not located in Midland County for more than a temporary period, it never acquired taxable situs there under section 21.02 of the Tax Code; and (3) oil flowing into and across Texas is exempt from *ad valorem* tax under section 11.12 of the Tax Code.[2]

Concluding that under state law, (i) the state lacked jurisdiction to tax the oil and (ii) the oil did not acquire taxable situs in Midland County, the trial court rendered judgment for TEPPCO and the other Respondents based solely on Texas state statutes. TEX TAX CODE §§ 11.01(c); 21.02. Moreover, the trial court made no reference to federal law in its judgment.[3] Nor is federal law referred to in the judgment of the Eleventh Court of Appeals which in pertinent part stated, "... the judgment of the trial court is in all things affirmed."[4] *Midland Central Appraisal District v. BP America*

---

[2] Section 11.12 is the codification of a state exemption from property tax for any property that is exempt under federal law.

[3] The trial court did conclude that in the alternative (to a judgment based on state law grounds) the oil was also (but independently) exempt from taxation under federal law. C.R., 348, 354.

[4] While the court of appeals' judgment makes no reference to federal law, its opinion does address and reject the Petitioner's points of error based on federal law.

Production Company et al., 282 S.W.3d 215 (Tex.App.—Eastland 2009, pet. denied) ("*MCAD*").

In *Long*, this Court held that the Court will presume jurisdiction unless the state court opinion "plainly states that it is based on a bona fide separate, adequate, and independent grounds." 463 U.S. at 1040-41. It is clear in the trial court judgment and appellate court judgment and opinion that this case was decided on separate, adequate, and independent state grounds. This is illustrated by the trial court's judgment which does not even mention federal law, and the appellate court opinion which addresses the federal and state law issues completely separate, independent and under bold subject headings.[5] Therefore, the U.S. Supreme Court lacks jurisdiction to grant certiorari in this case.

Because the absence of a jurisdictional basis is so glaring, TEPPCO will not address the merits of Petitioner's federal question in this paper. In the event certiorari is granted and/or further briefing requested, TEPPCO reserves the right to respond to the Petitioner's erroneous contention that the oil is taxable under Commerce Clause jurisprudence.

---

[5] For example, the court of appeals below divided its opinion into four main parts which were delineated by Roman numerals I-IV. The third, "*III MCAD's Appeal*" includes two sections, A and B. The latter, section IIIB is entitled: "*B. Was the oil Taxable in Midland County?*." Under that section there are three subsections "*1 Interstate Commerce*", "*2 Validity of Tax Under Commerce Clause*" and "*3 Validity of Tax Pursuant to State Law.*" Emphasis in the original *MCAD*, 282 S.W.3d 215 Appendix A-5, A-7, A-8, A-13, A-17, respectively

ARGUMENT

I. The Texas Courts Invalidated the Tax Based on State Law

In *Murdock v. Memphis*, 87 U.S. 590 (1875) ("*Murdock*") and others that have built on it[6], the court laid down two fundamental propositions. The Court will not review a case, even though it contains a federal question, if there is an adequate state ground that supports the decision of the state court. Further, the Court will accept as binding upon it the state court's decision on questions of state law. It has considered that the state courts speak with final authority on questions of state law. *Murdock*, 87 U.S. at 636.

The exceptions to this principle are very few. Decisions of the state court on state law are only persuasive, rather than controlling, when state law is incorporated by reference in a federal statute, *Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204 (1946), or when protection of a federal constitutional right would be thwarted if the state has the last word on state questions, *General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992), or when the state court interpretation of state law appears to be an "onerous subterfuge to evade consideration of a federal issue." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945). Nor can there be review when the state court has decided both the state and

---

[6] *Fox Film Corp v. Muller*, 296 U.S. 207 (1935), *Berea College v. Kentucky*, 211 U.S. 45 (1908), *Eustis v. Bolles*, 150 U.S. 361 (1893)

federal questions, if its decision of the federal question was unnecessary in light of its disposition of the state questions. *Sochor v. Florida*, 504 U.S. 527, 534 (1992).

MCAD attempts to frame a constitutional issue of potentially long ranging effect: whether oil passing through Texas on its way to another state is taxable under the Commerce Clause. MCAD lauds the many reasons why this issue needs to be resolved, but this case is an inappropriate vehicle to present that issue because it was decided primarily on independent and adequate state law grounds. In fact, Texas courts are instructed to resolve a case, if possible, on other than constitutional grounds. *VanDevender v. Woods*, 222 S.W.3d 430, 432-33 (Tex. 2007) ("*VanDevender*")

This is another indicia for concluding that the trial and appellate court judgments in this case are based on the Tax Code, independent of and not interwoven with any Commerce Clause considerations. That same judicial restraint is likewise evidenced by this Court not rendering advisory opinions. *Lambrix*, 520 U.S. at 522. Judicial restraint cautions that when a case may be decided on non-constitutional grounds, a decision should rest on that ground and not wade into ancillary constitutional questions. *VanDevender*, 222 S.W.3d at 432-33. Both the trial court and the appellate court exhibited judicial restraint in their judgments.

To understand why the U.S. Supreme Court lacks jurisdiction in this case, a simple illustration is useful: If a state court *invalidates* a tax under both state law and federal law then the U.S. Supreme Court must deny certiorari because the tax would be invalidated even if the state court's federal law ruling were incorrect.[7] But compare if a state court *validated* a tax under state law and federal law then the U.S. Supreme Court can grant review because a reversal of the state court's federal law decision would change the outcome of the case, i.e., the tax would be invalid under federal law. In the present case, the former situation is implicated. Moreover, even if the court of appeals wrongfully applied federal law as subsequently determined by this Court, the judgments of the courts below would stand. Irrespective of the validity of the lower courts' analysis of federal law, in this case the tax remains invalid under state law.

Trial Court Judgment Decided on State Law Grounds

The trial court judgment clearly rests on state law grounds. The court found as fact that the oil was not in Texas or in Midland County for longer than a temporary period, and thus concluded as a matter of law that the state had no jurisdiction to tax it under Tax Code §11.01. C.R., 348, 354 (CL 2). The court also held as fact that the ownership allocation of the tax by MCAD was not reasonably tied to the percentage of ownership of the oil to the

---

[7] Of course under this scenario, the Court would never reach the merits of the federal question because the Court would lack jurisdiction

respective Respondents. That fact finding by the court invalidated the tax on another separate state law ground: unlawful multiple taxation. C.R., 348, 351-353. Further, the trial court concluded, as a matter of law, that the oil had not acquired taxable situs in Midland County because it did not remain in the county for more than a temporary period. C.R., 348, 354. The trial court judgment signed by Judge Hyde does not even mention or make reference to federal law.

As the Texas courts exhibited, this case was decided based purely on state law grounds, as there are sufficient state statutes to guide the courts in correctly determining the taxability of the oil. The crux of determining the legality of an *ad valorem* tax in Texas on personal property is determining whether the property is in the state for more than a temporary period. TEX TAX CODE § 11.01 . The genesis of this litigation came from the Respondents primary contention not that the oil was exempt, but that the oil was not taxable at all. Article VIII, section 1(b) of the Texas Constitution and various state statutes (§§11.01, 21.02, etc...) all relate to the determination of whether the personal property is not "in the state", and the state lacks jurisdiction to tax property not "in the state." If the property is not in the state (i.e., not there for more than a temporary period) it is not taxable, and no federal law or question is implicated.[8]

---

[8] In *Fairchild Aircraft, Inc v Bexar Appraisal Dist.*, the Court of Appeals concluded that "as a general rule, jurisdiction to tax exists based on the length of time property is located in the taxing unit within Texas." 47 S W 3d 577, 581 (Tex App.—San

The Eleventh Court of Appeals' opinion and judgment upheld the trial court's ruling, solidifying the judgment based on state law grounds. In its opinion, the appellate court held that the tax was not valid under §21.02 of the Tax Code due to the temporary period during which the oil was located in Midland County, additionally writing that such a tax would violate the Commerce Clause. In its judgment, the appellate court held that the "judgment of the trial court is in all things affirmed." In the opinion, the appellate court did address federal law issues first, but, did so, simply because the court was addressing the points of error in the order and sequence in which MCAD had presented them in its appellate brief. The court of appeals, rightly so, was ruling on the issues which the MCAD based its appeal. The court explicitly addressed

---

Antonio 2001, pet denied) (citing *Pratt & Whitney Canada, Inc v McLennan County Appraisal Dist*, 927 S W 2d 641 (Tex App —Waco 1996, writ denied) Both cases demonstrate that the Legislature's plain language test under § 11 01 is the threshold inquiry, determines if property "is taxable," and precedes consideration of exemption under state or federal law. In *Pratt & Whitney*, the Court of Appeals held that there was no "taxable value" in dispute if the state has no jurisdiction to tax under § 11 01 *Id* at 643-44 "Whether property is located in a taxing district for more than a temporary period of time is an issue of fact." *Aransas County Appraisal Dist v. Patterson-UTI-Drilling (South) LP, LLLP,* No. 13-04-502-CV, 2005 Tex App. LEXIS 7033 (Tex.App.-- Corpus Christi Aug 26, 2005, no pet)(mem op., not designated for publication) In *Diamond Shamrock Ref. and Mktg Co v Nueces County Appraisal District*, 876 S W.2d 298, 304 (Tex 1994), Chief Justice Phillips states that "oil passing through a county without stopping, in pipelines or on trucks, would thus not be located in that county for more than a temporary period so as to allow taxation under the Code "

situs but not Texas jurisdiction because Texas jurisdiction was not raised as a point of error by the MCAD. However, the trial court did rule upon Texas' lack of jurisdiction to tax the oil, which is the ruling that stands.

Proving that the state law and federal law issues in this case are not so interwoven, as the Petitioner claims, is the court of appeals opinion which has a separate, independent section in the opinion that is entitled (in italics) *Validity of Tax Pursuant to State Law.* (*see* footnote 5, *infra*). Obviously the Eleventh Court of Appeals found that the state law and federal law issues were separate and independent from one another.

II. Opinion and Judgment Based on Adequate, Independent State Ground, So No Jurisdiction Exists

The most important and most difficult limitation on Supreme Court review of state court decisions has been well stated by Justice Jackson:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds... Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same

> judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). Granting certiorari review in this case would amount to nothing more than an advisory opinion, because even if the Court reversed the lower courts' analysis and application of federal law, the same overall result would nonetheless occur. A reversal on federal grounds would not necessitate a reversal on state law grounds, because the case was decided based on Texas statutes, Tax Code §§ 11.01 and 21.02, and the MCAD's improper allocation of ownership among the Respondents.

In order to bar Supreme Court review, the state ground must be "adequate." 16B Wright, Miller & Cooper, Jurisdiction 2d §§4025-4028. To bar review, the state ground also must be "independent." The Supreme Court can review if the state ground is "so interwoven with the other as not to be an independent matter." *Abie State Bank v. Weaver*, 282 U.S. 765, 773-777 (1931). The state ground is not independent if the state court appears to have believed that federal law compelled a particular interpretation of state law. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566-68 (1977). In this case, it is clear that the federal law did not compel nor influence the state law interpretation. The trial court judgment did not even mention federal law, so it explicitly rests solely on adequate, independent state grounds. And the

court of appeals opinion discusses state law and federal law wholly separate from one another.

In 1983, in *Long*, 463 U.S. 1032, the Court announced a then new approach:

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed the federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedent of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

Id. at 1040-41. The Court recognized in *Long* that there might still be cases in which clarification of the state decision might be necessary or appropriate. *Id.* at 1041, n. 6, but in most cases it has applied the "plain statement" rule without difficulty. *Harris v. Reed*, 489 U.S. 255, 261, n. 7 (1989). The rule applies regardless of whether the disputed state law ground is substantive or procedural. *Id.* at 261. But there is no need for a plain statement by the state

court to bar Supreme Court review if the decision does not appear to rest primarily on, or to be interwoven with, federal law. *Coleman*, 501 U.S. at 722. The decisions below in this case do not rest primarily on or are interwoven with federal law.[9]

III. Court of Appeals' Ruling on Texas Tax Code § 21.02 is Independent of its Writing on the Dormant Commerce Clause

Under the plain language of the Tax Code, Texas has no jurisdiction to tax the oil in question. Nor did the oil acquire taxable situs in Midland County. The trial court and court of appeals followed the directive in *VanDevender*: "Judicial restraint cautions that when a case may be decided on a non-constitutional ground, we should rest our decision on that ground and not wade into ancillary

---

[9] In addition, the existence of differing laws in different states does not confer jurisdiction on this Court For example, inventory (including crude oil inventory like that at issue here) is exempt from property tax in all but 14 states Accordingly, the fact that a petrochemical product in interstate pipelines may be subject to property tax in Oklahoma but not taxable in Texas does not create a constitutional "conflict" To the contrary, it is not uncommon in practice For instance, in Kansas, oil in pipelines is not taxable under state statutes, in Oklahoma oil in pipelines is taxable under state law and federal law, and in Texas oil in pipelines is not taxable under state law and coincidentally not taxable under federal law. Contrary to *amici* (Texas Association of School Boards, *et al* , Chambers County Appraisal District, *et al.*, and Dallas Central Appraisal District) and Petitioner, there is no conflict of law in Texas The Texas Supreme Court twice denied the Petitioner's petition for review, so the law is settled in Texas, with the trial court and appellate court in agreement

constitutional questions." *VanDevender*, 222 S.W.3d at 432-433; *see also In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003) ("As a rule, we only decide constitutional questions when we cannot resolve issues on non-constitutional grounds."). The rule is no different in this Court and it requires a denial of certiorari based on lack of jurisdiction. The U.S. Supreme Court lacks jurisdiction to review on direct appeal a question of federal law decided by a state court, if the state court decision rests on a state law ground that is independent of the federal question and is adequate to support the judgment; since the state law determination is sufficient to sustain the decree, any Supreme Court opinion on the federal question will be purely advisory. *Lambrix*, 520 U.S. at 521-523.

In its judgment, the court of appeals adopted the trial court's findings. The trial court's judgment was based solely on state law ground, with no mention of federal law. The court of appeals affirmed the trial court's fact finding that the oil was not present for "longer than a temporary period," so jurisdiction to tax and taxable situs respectively under Tax Code §§ 11.01 and 21.02 are not met. The relevant facts were determined sufficient to support the judgment and are immutable. On review of decisions of state courts, the stated rule is that "all those matters which are usually termed issues of fact are for conclusive determination by the state courts and are not open for reconsideration by this court. Observance of this restriction in our review of state courts calls for the utmost scruple." *Watts v. Indiana*, 338 U.S. 49, 50 (1949).

CONCLUSION

The trial court's fact finding that the oil was not in Texas for longer than a temporary period, the sufficiency of which was affirmed by the court of appeals, cannot now be challenged by the MCAD. Under this finding, §§ 11.01 and 21.02 of the Tax Code are not met. The MCAD has never alleged that §§ 11.01 and 21.02 are unconstitutional; therefore, there is no federal question in this case in that regard. The conclusions of law of the trial court clearly set out that this is not primarily an exemption case, but a taxability case. In its conclusions of law, the trial court made clear that its judgment was based on §§ 11.01 and 21.02 of the Tax Code and the illegality of the tax based on improper allocation and ownership. The reason the trial court's judgment lacks any reference to federal law is because it is unnecessary. The opinion of the court of appeals indicates a holding based on independent and adequate state law grounds. There is no interweaving.

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

Ray Albrecht
EPCO, Inc.
1100 Louisiana
Houston, TX 77002
(713) 381-8380

William Ikard
Counsel of Record
William W. Kilgarlin
J. Jordan Haedicke
Ikard Wynne LLP
515 Congress Ave.,
Suite 1320
Austin, TX 78701
(512) 275-7880
bill@ikardwynne.com

Counsel for TEPPCO Crude Oil LLC and TEPPCO Crude P/L LLC Respondents

APPENDIX A

Opinion filed March 26, 2009

[STATE SEAL OF TEXAS]

In The
Eleventh Court of Appeals

No. 11-07-00048-CV

MIDLAND CENTRAL APPRAISAL DISTRICT,
Appellant/Cross-Appellee

V.

BP AMERICA ET AL,
Appellees/Cross-Appellants

On Appeal from the 238th District Court
Midland County, Texas
Trial Court Cause No. CV44864 (consolidated)

OPINION

The issue in this case is whether an ad valorem tax may be imposed on crude oil located in Midland County in a tank farm that is an integral part of an interstate, common carrier pipeline system. In its appraisal rolls for 2003 and 2004, Midland Central Appraisal District (MCAD) included oil located in the tank farm on January 1 of the respective years. MCAD

allocated ownership of the oil to various shippers, including BP America Production Company; Amerada Hess Trading Company; Chevron USA, Inc.; ChevronTexaco Products Company; ChevronTexaco Global Supply and Trading Company; TEPPCO Crude Oil LLC; and TEPPCO Crude P/L LLC (hereinafter referred to collectively as the Oil Companies). The Oil Companies properly protested and ultimately brought four separate suits in district court. After consolidating the suits and conducting a nonjury trial, the trial court rendered judgment that the oil was not taxable but denied the Oil Companies' request for attorney's fees. MCAD appeals the trial court's ruling regarding the taxability of the oil, and the Oil Companies appeal the denial of attorney's fees. We affirm.

I. *Issues*

MCAD presents six issues for review. In the first issue, MCAD contends that the trial court erred as a matter of law in determining that the oil is not taxable in Midland County. In the second issue, MCAD contends that the trial court erred in finding that oil had no situs in Midland County. In the third issue, MCAD contends that the trial court erred in holding that the oil was in interstate commerce. In its fourth issue, MCAD challenges the legal and factual sufficiency of several findings of fact and asserts that the trial court erred in considering the oil as individual barrels rather than an aggregate inventory. MCAD argues in its fifth issue that the trial court erred in finding that the tax is not applied to an activity or oil with a substantial nexus to Texas. In its final issue,

MCAD asserts that the trial court erred in finding that MCAD's allocation of ownership of the oil was not reasonable.

The Oil Companies present two issues for review. In their first issue, the Oil Companies contend that the trial court erred in denying their request for attorney's fees because the award of attorney's fees was mandated by statute, specifically TEX. TAX CODE ANN. § 42.29 (Vernon 2008). In their second issue, the Oil Companies assert that MCAD waived its challenge to the award of attorney's fees by requesting findings of fact that support the award.

II. *Background Facts*

The record shows that the underlying facts in this case are largely undisputed. The unchallenged findings of fact indicate that oil at issue in this case was produced mostly in West Texas and a small amount in eastern New Mexico and was injected into the Midland Pipeline System, a spiderweb configuration of interconnecting pipelines covering more than two dozen counties in West Texas and eastern New Mexico. The Midland Pipeline System is an interstate, common carrier pipeline system that is regulated by the Federal Energy Regulatory Commission and is operated by various pipeline companies that are not parties to these proceedings. Upon injection of the subject oil into a pipeline, control and custody was relinquished to the pipeline companies; the oil, being fungible, became part of the common stream of oil.

Oil in the system travels through pipelines in Texas, taking no more than two and one-half weeks, to final destinations at various oil refineries located in Texas and in other states. During the journey, a large amount of oil passes through the tank farm where the Midland Pipeline System converges. The tank farm functions as an integral part of the Midland Pipeline System and exists to facilitate the transportation of the oil, not to store oil. The oil in the tank farm arrives and exits via the Midland Pipeline System. The time from entry into a tank to exit from a tank is six to seventy-two hours. However, a certain minimum volume of cushion oil is required to be maintained in each tank for safety reasons and to meet emission standards, resulting in the constant presence of a large amount of oil in the tank farm. Blending, batching, or staging of the oil may occur at the tank farm as necessary to facilitate the transmission of the oil through the Midland Pipeline System, but these processes do not interrupt the continuity of transit. The tanks are not used for storage.

Oil is bought, sold, and traded by document transfers irrespective of where the oil may be in the system. These transfers do not alter the movement of the oil or interrupt its in-transit movement to refineries. Upon arrival at a refinery, the oil is assessed and listed for taxation by the local appraisal authorities.[1] Furthermore, ad valorem taxes are assessed on the pipelines, tanks, physical assets, and

---

[1] We note also that a production tax is levied on oil that is produced in Texas. TEX TAX CODE ANN §202 051 (Vernon 2008).

equipment at the tank farm. In 2003 and 2004, those ad valorem taxes were timely paid.

III. *MCAD's Appeal*

A. Sufficiency of the Challenged Findings.

MCAD challenges several of the trial court's findings regarding the temporariness of the oil in Midland County and in Texas, the continuity of the oil's transit, the ultimate destination of the oil, and the oil's status as being in interstate commerce. MCAD argues in its fourth issue that there is no evidence to support the challenged findings and that the evidence is factually insufficient to support those findings. MCAD also argues in its fourth issue that the trial court erred in considering the oil as individual barrels of oil rather than an oil inventory.

We review sufficiency challenges to a trial court's findings of fact under the same standards that we use to review a jury's findings. *Catalina v. Blasdel,* 881 S.W.2d 295, 297 (Tex.1994); *Anderson v. City of Seven Points,* 806 S.W.2d 791, 794 (Tex.1991). In analyzing a legal sufficiency challenge, we must determine whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. *City of Keller v. Wilson,* 168 S.W.3d 802, 827 (Tex.2005). We must review the evidence in the light most favorable to the challenged finding, crediting any favorable evidence if a reasonable factfinder could and disregarding any contrary evidence unless a reasonable factfinder could not. *Id.*

at 821-22, 827. We may sustain a no-evidence or legal sufficiency challenge only when (1) the record discloses a complete absence of a vital fact, (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (3) the only evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. *Id.* at 810 (citing Robert W. Calvert, "*No Evidence*" *and* "*Insufficient Evidence*" *Points of Error,* 38 TEX L. REV. 361, 362-63 (1960)). In analyzing a factual sufficiency challenge, we must consider and weigh all of the evidence and determine whether the evidence in support of a finding is so weak as to be clearly wrong and unjust or whether the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *Dow Chem. Co. v. Francis,* 46 S.W.3d 237, 242 (Tex.2001); *Pool v. Ford Motor Co.,* 715 S.W.2d 629, 635 (Tex.1986); *In re King's Estate,* 150 Tex. 662, 244 S.W.2d 660, 661 (1951). We review a trial court's conclusions of law, including those mislabeled as findings of fact, de novo. *See BMC Software Belgium, N.V. v. Marchand,* 83 S.W.3d 789, 794 (Tex.2002).

At trial, several witnesses, including employees of the pipeline companies, explained that a tank is basically a wide spot in a pipeline and that the tank farm is simply a gathering location of multiple pipelines that bring barrels of oil in at varying rates and varying pressures and allows the oil to be gathered to move on to the next destination. The Oil Companies are not allowed to store oil in the pipeline

system. The oil in the tanks is in constant movement: either filling or withdrawing. After reviewing all the evidence, we hold that, although there is a substantial quantity of oil that is constantly present in the tanks, the trial court's findings regarding the continuity of the oil's transit are supported by legally and factually sufficient evidence.

MCAD also challenges findings regarding the ultimate destination of the oil and the oil's status as being in the stream of interstate commerce. The trial court found that a vast majority of the oil located in the tank farm is sent to refineries located outside of Texas and that less than ten percent of the oil remains in Texas. These findings are supported by testimony showing that the oil passing through the tank farm travels through the pipeline system and can be offloaded at only three refineries in Texas. Testimony showed that the amount of oil offloaded at these three refineries amounts to less than ten percent of the oil that passes through the tank farm in the pipeline system and that "the rest of the oil has to leave the state." After reviewing all of the evidence, we hold that the challenged findings of fact are supported by legally and factually sufficient evidence. To the extent that MCAD's fourth issue challenges the sufficiency of the evidence, it is overruled.

B. Was the Oil Taxable in Midland County?

Unless exempt by law, tangible personal property in Texas is taxable if it is located in Texas for longer than a temporary period, is temporarily located

outside Texas but the owner resides in Texas, or is used continually in Texas. TEX. TAX CODE ANN. § 11.01 (Vernon 2008); *see also* TEX. TAX CODE ANN. § 21.02 (Vernon 2008) (taxable situs in taxing unit). In determining whether the oil at issue in this case was taxable, we address whether the oil was in the stream of interstate commerce, whether the trial court erred in failing to consider the oil as a constant presence in the tanks rather than individual barrels in transit, and whether the oil had situs in Midland County. We ultimately conclude that the tax violated the Commerce Clause of the United States Constitution, U.S. CONST. art. I, § 8, cl. 3, and that the tax was not valid under Section 21.02(a)(1) due to the temporary period during which the oil was located in Midland County.

1. Interstate Commerce.

The first question is whether the oil had been placed into the stream of interstate commerce. MCAD argues that it had not. Interstate commerce "occurs when goods 'have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey.'" *Va. Indon Co. v. Harris County Appraisal Dist.*, 910 S.W.2d 905, 908 (Tex.1995) (*VICO*) (citing *Coe v. Errol*, 116 U.S. 517, 527, 6 S.Ct. 475, 29 L.Ed. 715 (1886)).

The trial court found and the uncontroverted evidence indicates that, prior to making its way to the tank farm, the subject oil was injected into a federally

regulated, interstate common carrier pipeline system. Once injected, the oil remained in the pipeline and under the pipeline's control until it reached its ultimate destination, a refinery. The evidence also shows that the tanks in the tank farm are and were an integral part of the interstate pipeline system and that, although the destination of the oil actually in the tanks at the time of the assessment could not be determined, over ninety percent of the oil passing through the tank farm was transported to refineries out of state. *See Eureka Pipe Line Co. v. Hallanan,* 257 U.S. 265, 272, 42 S.Ct. 101, 66 L.Ed. 227 (1921) (stating that a tank in an oil pipeline "may be regarded as a pipe of larger size").

The next question is whether the oil remained in transit in the stream of interstate commerce when it was at the tank farm. MCAD asserts that the subject oil should be viewed as a massive constant presence of oil in the tank farm and that, if so viewed, it cannot be concluded that the oil was in interstate commerce or that it was only temporarily in Midland County. In support of this contention, MCAD relies upon *Diamond Shamrock Refining and Marketing Co. v. Nueces County Appraisal District,* 876 S.W.2d 298 (Tex.1994), and *Exxon Corp. v. San Patricio County Appraisal District,* 822 S.W.2d 269 (Tex.App.–Corpus Christi 1991, writ denied). We find these cases to be factually distinguishable.

In *Diamond Shamrock,* the supreme court held that oil stored in tanks was subject to an ad valorem tax where the oil was imported from abroad into

Texas, which was its final destination. 876 S.W.2d 298. Upon arriving in Texas, the oil, which was owned by Diamond Shamrock and destined for Diamond Shamrock's refinery in Texas, was offloaded into a storage facility and stored in tanks before being transported to a refinery in another county by pipeline. Although the parties stipulated that the oil at issue was "in transit," the court determined that the situs of each barrel should not be considered because the incidence of the tax imposed was the year-round presence in the storage facility of a large volume of oil belonging to Diamond Shamrock. *Id.* at 300-04. The court in *Diamond Shamrock* specifically limited its holding to foreign goods in transit through only one state that remain in that state. *Id.* at 302, n. 7. Furthermore, the oil at issue in *Diamond Shamrock* was located in a storage facility, whereas the oil at issue in this case had been injected into interstate common carrier pipelines and was located in tanks that were an integral part of the common carrier pipeline system within the stream of interstate commerce. Even when viewed as a constant presence, the oil at issue in this case, like the massive quantity of oil constantly present within the pipelines themselves, was located in the stream of interstate commerce where it had been commingled with oil from numerous other shippers and was-for the most part-being transported to another state.

In *Exxon,* as in the present case, oil that was located in working tanks was taxed. 822 S.W.2d 269. The court ruled that, although each individual barrel remained in the county for no longer than seventeen

days, the oil acquired situs there because Exxon maintained at all times a massive quantity of oil in the tanks. *Id.* at 272-74. As in *Diamond Shamrock,* however, the oil in *Exxon* was not destined for any location outside the State of Texas. The oil at issue in *Exxon* was transported, refined, and sold in Texas. *Id.* at 272. Nothing in the court's opinion in *Exxon* indicates that interstate commerce was involved.

Subsequent to its opinion in *Diamond Shamrock,* the Texas Supreme Court considered and struck down an ad valorem tax assessed on goods that had been placed into the export stream of commerce but were temporarily located in a facility belonging to an independent export packer. *VICO,* 910 S.W.2d at 906-08. Although the court in *VICO* relied upon the Import-Export Clause, U.S. CONST. art. I, § 10, rather than the Commerce Clause to invalidate the tax, the court recognized that the doctrine used to determine whether goods are in transit at the time of taxation applies equally under either clause. *Id.* at 908 & n.1. The court recognized the year-round presence in the packer's facility of goods belonging to VICO but did not rely on the goods' constant presence as a factor in its determination that the goods remained in transit and in the stream of export. *Id.* at 907-14.

In *VICO,* the goods had been committed to foreign export and were transported to the packer's facility to be checked, approved for import into Indonesia, inspected, packaged, and cleared for shipping. *Id.* at 907, 913-14. The court held that the temporary stoppage of the goods at the packer's

facility, which usually took no more than forty-five days, did not break the continuity of transit and that the goods remained in the stream of export. *Id.* at 907, 912-14. In determining whether the stoppage disrupted the continuity of transit, the court in *VICO* followed Supreme Court precedent and reasoned that it "is the *purpose* of the stoppage that is important." *Id.* at 912 (citing *Champlain Realty Co. v. Town of Brattleboro,* 260 U.S. 366, 376-77, 43 S.Ct. 146, 67 L.Ed. 309 (1922), and *Minnesota v. Blasius,* 290 U.S. 1, 11-12, 54 S.Ct. 34, 78 L.Ed. 131 (1933)). When the stoppage is attributable to a business purpose of the owner, the in-transit status is deemed to have terminated, and the goods are subject to taxation in the jurisdiction where they are stopped. *Id.* In contrast, if the stoppage is a necessity of the journey or for the purpose of safety and convenience in the course of the journey, the stoppage does not interrupt the continuity of transit. *Id.*

In the present case, the "stoppage" was not related to a business purpose of the owner. The evidence and the trial court's findings indicate that, barring any malfunction, oil is delayed for six to seventy-two hours in the tank farm for purposes related to the operation of the pipeline system. Each tank is required to maintain 8,000 to 10,000 barrels of oil as a cushion for safety and emission reasons. Oil may also be delayed for blending, batching, or staging-operational functions of the pipeline system that are

necessary to facilitate the transmission of the oil.[2] Thus, as in *VICO*, the "stoppage" of the oil did not interrupt the continuity of transit.

We hold that the trial court correctly determined that the oil was in the stream of interstate commerce. The oil had been injected into a common carrier pipeline system and remained in that interstate system at the time of the tax assessment. Any delay at the tank farm was not attributable to the Oil Companies but, rather, was incidental to the transportation of the oil by the common carrier and was necessary for the safe and efficient operation of the pipeline system.

2. Validity of Tax Under Commerce Clause.

Next, we must determine whether the tax on the oil in interstate transit violated the Commerce Clause. The Commerce Clause grants Congress the power to regulate interstate commerce and implicitly prohibits certain state regulation of interstate commercial activity. *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995). However, not all state taxes on interstate commerce are prohibited. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).

---

[2] Blending is the mixing of oil of low sulfur content (sweet crude) with oil of higher sulfur content (sour crude) Batching keeps oil of different grades separate Staging is the accumulation of sufficient volumes of oil necessary for transmission in the pipeline system

Pursuant to *Complete Auto,* a state tax does not violate the Commerce Clause if it meets a four-pronged test set out by the Court. To be valid, the tax must (1) apply to an activity with a substantial nexus with the taxing state, (2) be fairly apportioned, (3) not discriminate against interstate commerce, and (4) be fairly related to the services provided by the state. *Id.* at 279, 287, 97 S.Ct. 1076; *Vinmar, Inc. v. Harris County Appraisal Dist.,* 947 S.W.2d 554, 555 (Tex. 1997). To establish that a state tax is unconstitutional, the taxpayer need only prove that the tax fails one prong of the *Complete Auto* test. *Vinmar,* 947 S.W.2d at 555.

The trial court concluded that the tax violated the Commerce Clause and that the tax did not satisfy the "substantial nexus" requirement of the *Complete Auto* test. The substantial nexus requirement of *Complete Auto* is a means for limiting state burdens on interstate commerce *Quill Corp. v. North Dakota,* 504 U.S. 298, 313, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992).

In support of their contention regarding substantial nexus, the Oil Companies cite to a recent opinion of the Texarkana Court of Appeals, *Peoples Gas, Light, & Coke Co. v. Harrison Central Appraisal District,* 270 S.W.3d 208 (Tex.App.–Texarkana 2008, pets. filed). In *Peoples,* the court struck down an ad valorem tax assessed against the owner of natural gas on gas that had been placed into the stream of interstate commerce and was located in an underground storage facility owned by an interstate

pipeline company. The court determined that the tax violated the Commerce Clause because the gas owner's activities in Texas and its connection to Texas were too tenuous to create a substantial nexus. 270 S.W.3d at 218.

In contrast, MCAD asserts that we should not follow *Peoples* but should instead follow the decision reached by the Supreme Court of Oklahoma in *In re Assessment of Personal Property Taxes Against Missouri Gas Energy, a Division of Southern Union Co.*, No. 103,355, 2008 WL 4648330 (Okla. Oct.21, 2008). In *Missouri Gas*, the court upheld an ad valorem tax on gas held in an underground storage facility owned and operated by an interstate, common carrier pipeline. Missouri Gas Energy owned the gas, which was ultimately transported out of state. The Oklahoma court determined that the gas was not merely passing through the county to an out-of-state destination because the large volumes of gas that were stored in the facility for a substantial part of the year were "not in transit in such a way as to invoke the protection of the Commerce Clause." 2008 WL 4648330, at *11.

We find at least one crucial fact of *Missouri Gas* to be distinguishable from the facts of the present case. The crude oil in the present case was not in storage but, rather, was in transit in the stream of interstate commerce. For this same reason, the case at hand presents an even stronger case for a Commerce Clause violation than did the circumstances in *Peoples*.

To comply with the first prong of the *Complete Auto* test, the ad valorem tax on the oil in the tank farm must have applied to an activity with a substantial nexus with Texas. Although the oil itself had a substantial nexus with this state as much of it was produced in this state and some of it was destined for an in-state refinery, the "activity" being taxed had no such nexus. The activity essentially being taxed in this case was the ownership of oil that was present but in transit on January 1 in a tank farm that constituted an integral part of an interstate, common carrier pipeline system.

Furthermore, if the tax in this case is upheld, then ad valorem taxes could potentially be levied by any taxing authority on oil in transit but located, at the time of assessment, in the portion of an interstate pipeline system within the boundaries of that taxing authority. The result would be an impermissible multiple burden on interstate commerce. *See Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 170, 74 S.Ct. 396, 98 L.Ed. 583 (1954) (holding that tax on taking of gas into interstate pipeline infringed upon the Commerce Clause and recognizing that such tax would permit a multiple burden upon commerce because other states could impose a tax on the first taking of the same gas in their state). We hold that the tax in the present case does not satisfy the *Complete Auto* test and that it runs afoul of the Commerce Clause.

3. Validity of Tax Pursuant to State Law.

Section 21.02 provides in relevant part that tangible property in Texas is taxable by a taxing unit if "it is located in the unit on January 1 for more than a temporary period." Section 21.02(a)(1).[3] The trial court concluded that the oil was not located in Midland County for longer than a temporary period. We agree.

As discussed above, the record shows that the oil had been injected into an interstate, common carrier pipeline system; that the oil merely traveled through Midland County in the pipeline system; that any delay of the oil in the tank farm was temporary and was necessary only to facilitate the continued transportation of the oil; and that the tank farm was not used for storage. Although much of the oil had a nexus with Texas in that it was produced in Texas, it had no such nexus with Midland County. The oil was merely transported through Midland County and was only temporarily located in the county. Thus, we hold

---

[3]We note that MCAD asserts in its brief that the oil is also taxable pursuant to Section 21 02(a)(4), which allows personal property to be taxed if "the owner resides (for property not used for business purposes) or maintains the owner's principal place of business in this state (for property used for business purposes) in the unit and the property is taxable in this state but does not have a taxable situs pursuant to Subdivisions (1) through (3) of this subsection " However, the trial court made no findings of fact on this issue, and MCAD did not request that the trial court make a finding regarding the principal place of business Moreover, the evidence does not indicate that Midland County is the principal place of business in this state for any of the Oil Companies

that the trial court did not err in concluding that the oil had no taxable situs in Midland County.

The tax was not valid under the Commerce Clause or Section 21.02(a)(1). Consequently, MCAD's first, second, third, fourth, and fifth issues are overruled. We need not reach MCAD's sixth issue concerning allocation of ownership. TEX. R. APP. P. 47.1.

IV. *Oil Companies' Appeal*

The Oil Companies appeal the trial court's refusal to award them attorney's fees. In Texas, attorney's fees are recoverable from an opposing party only when authorized by statute or by contract between the parties. *Travelers Indem. Co. of Conn. v. Mayfield,* 923 S.W.2d 590, 593 (Tex. 1996). The Oil Companies assert that attorney's fees were authorized by Section 42.29 of the Tax Code. The trial court entered findings of fact as to the amount of attorney's fees that would be reasonable if recoverable under Section 42.29. The trial court concluded, however, that the Oil Companies were not entitled to attorney's fees under Section 42.29.

Section 42.29 provides that a "property owner who prevails in an appeal to the court under Section 42.25 or 42.26 may be awarded reasonable attorney's fees." TEX. TAX CODE ANN. § 42.25 (Vernon 2008) provides a remedy for an excessive appraisal, entitling the owner to a reduction of the appraised value on the appraisal roll. TEX. TAX CODE ANN. § 42.26 (Vernon

2008) provides a remedy for the unequal appraisal of property in relation to the appraised values of other properties. Sections 42.25 and 42.26 do not apply to this case because the Oil Companies did not challenge the appraised value of the oil; they challenged the ability of Midland County to tax the oil. Consequently, since the Oil Companies did not prevail on a claim "under Section 42.25 or 42.26," attorney's fees were not authorized by Section 42.29. If the legislature had intended for attorney's fees to be recoverable in a case of this type, it could have included in its Section 42.29 authorization of attorney's fees an appeal challenging the inclusion of the property on the appraisal roll, the determination of ownership, or the denial of an exemption. The legislature specifically authorized such protests in TEX. TAX CODE ANN. § 41.41(a) (Vernon 2008) (listing nine distinct actions that may be protested by taxpayer, including: excessive value, unequal appraisal, denial of an exemption, ownership, and inclusion on tax roll). The legislature, however, did not authorize attorney's fees for all such protests. Section 42.29 authorizes attorney's fees for only two distinct types of protest: excessive value and unequal appraisal. *Dallas Cent. Appraisal Dist. v. Seven Inv. Co.*, 835 S.W.2d 75, 77-79 (Tex. 1992). The Oil Companies' protest cannot be categorized as falling within either of those two. *See id.* The Oil Companies' first issue is overruled.

In the second issue, the Oil Companies assert that MCAD waived any complaint it had to the award of attorney's fees by requesting findings of fact that supported an award of attorney's fees. We disagree.

MCAD repeatedly objected to issues related to the prospective award of attorney's fees, and MCAD did not request any findings of fact that would entitle the Oil Companies to attorney's fees or waive MCAD's objection to such fees. MCAD merely requested that the trial court amend its findings regarding attorney's fees to omit the phrase "recoverable under Tax Code § 42.29." The requested amendments reflected MCAD's continued objection to the award of attorney's fees and continued contention that the fees were not "recoverable." Moreover, MCAD did not ask the trial court to amend Conclusion of Law No. 9, wherein the trial court concluded: "The Oil Companies are not entitled to attorney's fees under Tax Code § 42.29." MCAD did not waive its complaint to the award of attorney's fees. The Oil Companies' second issue is overruled.

V. *Conclusion*

The judgment of the trial court is affirmed.

JIM R. WRIGHT
CHIEF JUSTICE

March 26, 2009

Panel Consists of: Wright, J.J.,
McCall, Jr., and Strange, J.

11th COURT OF APPEALS
EASTLAND, TEXAS

JUDGMENT

Midland Central Appraisal District,

Vs. No. 11-07-00048-CV

BP America Production Company et al,

* From the 238th District Court of Midland County, Trial Court No. CV 44864 (consolidated)

* March 26, 2009

* Opinion by Wright, C.J.
(Panel consists of: Wright, C.J., McCall, J., and Strange, J.)

This court has inspected the record in this cause and concludes that there is no error in the judgment below. Therefore, in accordance with this court's opinion, the judgment of the trial court is in all things affirmed. The costs incurred by reason of this appeal are taxed against Midland Central Appraisal District.

APPENDIX B

[DATE STAMP]
FILED
2006 DEC 22 AM 11:13
[ILLEGIBLE] DISTRICT CLERK
MIDLAND COUNTY, TEXAS
BY, _____
DEPUTY

NO. CV44864 (consolidated)

BP AMERICA PRODUCTION COMPANY,
Plaintiff,

v.

IN THE DISTRICT COURT
MIDLAND COUNTY, TEXAS
238th JUDICIAL DISTRICT

MIDLAND CENTRAL APPRAISAL DISTRICT,
Defendant.

NO. CV44867

AMERADA HESS TRADING COMPANY,
Plaintiff,

v.

IN THE DISTRICT COURT
MIDLAND COUNTY, TEXAS
385th JUDICIAL DISTRICT

MIDLAND CENTRAL APPRAISAL DISTRICT,
Defendant.

NO. CV44863

CHEVRON USA, INC.,
CHEVRONTEXACOPRODUCTS COMPANY, and
CHEVRONTEXACO GLOBAL SUPPLY AND
TRADING COMPANY,
Plaintiffs,

v.

IN THE DISTRICT COURT
MIDLAND COUNTY, TEXAS
142nd JUDICIAL DISTRICT

MIDLAND CENTRAL APPRAISAL DISTRICT,
Defendant.

NO. CV44865

TEPPCO CRUDE OIL LLC and
TEPPCO CRUDE P/L LLC
Plaintiffs,

v.

IN THE DISTRICT COURT
MIDLAND COUNTY, TEXAS
238th JUDICIAL DISTRICT

MIDLAND CENTRAL APPRAISAL DISTRICT,
Defendants.

FINAL JUDGMENT

Beginning on October 9, 2006, the above-styled and numbered cause of action was presented for trial before this Court. Each party appeared by its attorneys of record and announced that it was ready to present evidence.

All matters in controversy, legal and factual, were submitted to the Court for its determination without a jury until all the parties rested on November 3, 2006. The Court heard the evidence and arguments of counsel and, on November 30, 2006, returned its decision for Plaintiffs, announcing that judgment would be rendered. The Court renders judgment pursuant to Texas Tax Code section 42.24.

1. It is, therefore, ordered, adjudged and decreed that Plaintiffs' property that is the subject of this lawsuit is not taxable during tax years 2003 and 2004 pursuant to Texas Tax Code §11.01.

2. It is further ordered, adjudged and decreed that Defendant shall remove all of Plaintiffs' property that is the subject of this lawsuit from the Midland Central Appraisal District appraisal roll for tax years 2003 and 2004.

3. It is further ordered that Plaintiff shall recover court costs from Defendant as provided in Texas Tax Code §42.07 as approved by the Court in the final bill of costs.

4. It is further ordered that Defendant shall comply with all postappeal administrative procedures as set out in Subchapter C of the Texas Tax Code, sections 42.41 through 42.43.

5. Plaintiffs' request for attorneys' fees based on Texas Tax Code section 42.29 is denied.

6. This judgment disposes of all claims and all parties and is, therefore, a final and appealable judgment.

SIGNED on the 22nd day of December, 2006

/s/
The Honorable Judge John G. Hyde

APPENDIX C

Title 1. Property Tax Code
Subtitle C. Taxable Property and Exemptions

Chapter 11. Taxable Property and Exemptions

Subchapter A. Taxable Property.

Sec. 11.01. Real and Tangible Personal Property.
Sec. 11.02. Intangible Personal Property.

[Sections 11.03 to 11.10 reserved for expansion]

Sec. 11.01. Real and Tangible Personal Property.

(a) All real and tangible personal property that this state has jurisdiction to tax is taxable unless exempt by law.

(b) This state has jurisdiction to tax real property if located in this state.

(c) This state has jurisdiction to tax tangible personal property if the property is:

(1) located in this state for longer than a temporary period;

(2) temporarily located outside this state and the owner resides in this state; or

(3) used continually, whether regularly or irregularly, in this state.

(d) Tangible personal property that is operated or located exclusively outside this state during the year preceding the tax year and on January 1 of the tax year is not taxable in this state.

Amended by 1983 Tex. Laws, p. 1908, ch. 353, Sec. 1; amended by 1989 Tex. Laws, p. 1751, ch. 534, Sec. 2.

APPENDIX D

Sec. 11.12. Federal Exemptions

Property exempt from ad valorem taxation by federal law is exempt from taxation.

Acts 1979, 66th Leg., p. 2234, ch. 841, §1, eff. Jan. 1, 1980.

183

No. 10-890

Supreme Court, U.S.
FILED
MAR 11 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MIDLAND CENTRAL APPRAISAL DISTRICT,

Petitioner,

v.

BP AMERICA PRODUCTION CO., AMERADA HESS TRADING COMPANY, CHEVRON USA, INC., CHEVRONTEXACO PRODUCTS COMPANY, CHEVRONTEXACO GLOBAL SUPPLY AND TRADING COMPANY, TEPPCO CRUDE OIL LLC AND TEPPCO CRUDE P/L LLC,

Respondents.

On Petition For A Writ Of Certiorari To The Texas Court Of Appeals For The Eleventh Appellate District

BRIEF IN OPPOSITION

LYNNE LIBERATO
Counsel of Record
HAYNES AND BOONE, LLP
1221 McKinney, Suite 2100
Houston, Texas 77010-2007
Telephone: (713) 547-2000
Lynne.Liberato@haynesboone.com

LAURIE RATLIFF
IKARD & GOLDEN, P.C.
400 W. 15th St., Suite 975
Austin, Texas 78701
Telephone: (512) 472-6695
Lratliff@ikardgolden.com

Attorneys for Respondents BP America Production Company, Amerada Hess Trading Company, Chevron USA, Inc., ChevronTexaco Products Company and ChevronTexaco Global Supply and Trading Company

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Should this Court review a state intermediate appellate court's decision applying the Commerce Clause analysis established by *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977) on a state tax assessed on oil moving in an interstate pipeline on its way to out-of-state refineries?

LIST OF PARTIES

The caption of the case lists the parties to the proceeding.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent BP America Production Company

BP America Production Company's parent company is BP Company North America, Inc. No other publicly held company owns 10% or more of BP America Production Company's stock.

Respondent Amerada Hess Trading Company

Amerada Hess Trading Company's parent company was Amerada Hess Corporation. Amerada Hess Corporation has changed its name to Hess Corporation. No other publicly held company owns 10% or more of Amerada Hess Trading Company's stock.

Respondent Chevron USA, Inc.

Chevron USA, Inc.'s parent company is Chevron Corporation. No other publicly held company owns 10% or more of Chevron USA, Inc.

Respondent ChevronTexaco Products Company

ChevronTexaco Products Company was an unincorporated division of Chevron USA, Inc. ChevronTexaco Products Company has changed its name to Chevron Products Company. As an unincorporated division of

RULE 29.6 CORPORATE DISCLOSURE STATEMENT – Continued

Chevron USA, Inc., there is no separate ownership of Chevron Products Company. Chevron USA, Inc.'s parent company is Chevron Corporation. No other publicly held company owns 10% or more of Chevron USA, Inc.

Respondent ChevronTexaco Global Supply and Trading Company

ChevronTexaco Global Supply and Trading Company was an unincorporated division of Chevron USA, Inc. ChevronTexaco Global Supply and Trading Company's activities have been transferred to Chevron Products Company. As an unincorporated division of Chevron USA, Inc., there is no separate ownership of Chevron Products Company. Chevron USA, Inc.'s parent company is Chevron Corporation. No other publicly held company owns 10% or more of Chevron USA, Inc.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Corporate Disclosure Statement	ii
Table of Contents	iv
Table of Authorities	vii
Introduction	1
Response to Statement of Jurisdiction	2
Constitutional and Statutory Provisions	3
Statement of the Case	4
A. Factual background	5
B. Proceedings below	9
Reasons for Denying the Petition for Writ of Certiorari	11
I. There is no basis for U.S. Supreme Court jurisdiction	11
A. Two adequate and independent state law grounds support the judgment	11
1. State law controls state tax issues	12
2. State law grounds are different than federal law	15
3. The court of appeals treated the Commerce Clause issue separate from the state law situs issue	16
B. There is no conflict and no important federal question	18

TABLE OF CONTENTS – Continued

Page

II. The state court of appeals applied the correct legal standard and reached the right result 21

A. The state court of appeals applied *Complete Auto* 21

B. The appraisal district misconstrues the state court of appeals' opinion 22

III. Existing law refutes the appraisal district's reasons for granting certiorari 24

A. "Constant presence" alone does not satisfy the substantial nexus factor 24

1. The appraisal district's argument is contrary to existing law 25

2. The appraisal district's cases do not support a one-factor test 26

3. The court below properly rejected "constant presence" as controlling 29

B. "Continuity of transit" is a factor in the nexus analysis 31

1. Courts consider continuity of transit 31

2. Cases cited do not support the appraisal district's argument 33

3. The court of appeals considered the oil's actual movement 36

TABLE OF CONTENTS – Continued

Page

C. This Court has endorsed consideration of "activities" in the nexus analysis 36

D. The Oil Companies never challenged the other *Complete Auto* factors 38

IV. Amici offer no compelling grounds for granting certiorari 38

V. The Court should deny certiorari in this case and in *Peoples Gas* 39

Conclusion 41

Appendix

BP America Production Co. et al., v. Midland Central Appraisal Dist., No. CV-44864 – Trial Court Final Judgment (December 22, 2006) ..... App. 1

Midland Central Appraisal Dist. v. BP America Production Co., 11-07-00048-CV, in the Eleventh District Court of Appeals, Eastland, Texas – Court of Appeals Judgment (March 26, 2009) ..... App. 4

TABLE OF AUTHORITIES

Page

CASES

Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768 (1992) 25, 37

American Steamship Co. v. Limbach, 572 N.E.2d 629 (Ohio 1991) 34

In re Assessment of Pers. Property Taxes Against Missouri Gas Energy, 234 P.3d 938 (Okla. 2008), *cert. denied*, 130 S. Ct. 1685 (2010) ..... *passim*

Bunting v. Mellen, 541 U.S. 1019 (2004) 19

Carson Petroleum Co. v. Vial, 279 U.S. 95 (1929) 31

Chesapeake and Potomac Tel. Co. of Maryland v. Comptroller of the Treasury, 528 A.2d 536 (Md. Ct. Spec. App. 1987), *aff'd*, 561 A.2d 1034 (Md. 1989) 35

Columbia Gulf Transmission Co. v. Broussard, 653 So.2d 522 (La. 1995) 36

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 28

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) ..... *passim*

D.H. Holmes Co. v. McNamara, 486 U.S. 24 (1988) 25, 31, 32, 35

Dallas County Appraisal Dist. v. L.D. Brinkman & Co. (Texas), Inc., 701 S.W.2d 20 (Tex. App. – Dallas 1985, writ ref'd n.r.e.) 14

TABLE OF AUTHORITIES – Continued

Page

Diamond Shamrock Ref. & Mktg. Co. v. Nueces County Appraisal Dist., 876 S.W.2d 298 (Tex. 1994) ..... *passim*

Enterprise Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157 (1917) 17

Eureka Pipe Line Co. v. Hallanan, 257 U.S. 265 (1921) 26

Florida v. Powell, ___ U.S. ___, 130 S. Ct. 1195 (2010) 16, 17

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 2

Havill v. Gurley, 382 So.2d 109 (Fla. Dist. Ct. App. 1980) 35

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 28

Kentron, Inc. v. State Bd. of Tax Comm'rs, 572 N.E.2d 1366 (Ind. Tax Ct. 1991) 34

LeCroy v. Hanlon, 713 S.W.2d 335 (Tex. 1986) 12

Marathon Ashland Petroleum L.L.C. v. Galveston Cent. Appraisal Dist., 236 S.W.3d 335 (Tex. App. – Houston [1st Dist.] 2007, no pet.) 23

Maryland v. Louisiana, 451 U.S. 725 (1981) 26

Michigan v. Long, 463 U.S. 1032 (1983) 12, 16, 17

Midland Cent. Appraisal Dist. v. BP America Prod. Co., 282 S.W.3d 215 (Tex. App. – Eastland 2009, pet. denied) ..... *passim*

Mississippi River Transmission Corp. v. Simonton, 442 So.2d 764 (La. Ct. App. 1983) 36

TABLE OF AUTHORITIES – Continued

Page

Mississippi State Tax Comm'n v. Murphy Oil USA, Inc., 933 So.2d 285 (Miss. 2006) 35

Norandex, Inc. v. Limbach, 630 N.E.2d 329 (Ohio 1994) 34

Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 511 U.S. 93 (1994) 12

Patterson-UTI Drilling Co. v. Webb County Appraisal Dist., 182 S.W.3d 14 (Tex. App. – San Antonio 2005, no pet.) 13, 14

Peoples Gas, Light, & Coke Co. v. Harrison Cent. Appraisal Dist., 270 S.W.3d 208 (Tex. App. – Texarkana 2008, pet. denied) 18, 37, 39, 40

Predka v. Iowa, 186 F.3d 1082 (8th Cir. 1999) 34

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) 25, 38

Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983) 13

Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) 26

Sterling Custom Homes, Inc. v. Comm'r of Revenue, 1985 WL 6207 (Minn. Tax. 1985), *aff'd*, 391 N.W.2d 523 (Minn. 1986) 35

T.A. Operating Corp. v. State of Florida, Dep't of Revenue, 767 So.2d 1270 (Fla. Dist. Ct. App. 2000) 34

Three Affiliated Tribes v. Wold Eng'g, P.C., 467 U.S. 138 (1984) 17

TABLE OF AUTHORITIES – Continued

Page

United Gas Pipe Line Co. v. Whitman, 390 So.2d 913 (La. Ct. App. 1980) 36

United States v. Johnson, 268 U.S. 220 (1925) 20

Virginia Indonesia Co. v. Harris County Appraisal Dist., 910 S.W.2d 905 (Tex. 1995) 30

Word of Life Christian Ctr. v. West, 936 So.2d 1226 (La. 2006).....36

CONSTITUTION, STATUTORY PROVISIONS AND RULES

U.S. CONST. art. I, § 8, cl. 3.....2, 16

28 U.S.C. 1257(a).....19

TEX. TAX CODE ANN. § 11.01 .....3, 9, 14

TEX. TAX CODE ANN. § 11.01(c).....3, 38

TEX. TAX CODE ANN. § 11.01(c)(1) 3, 13, 15

TEX. TAX CODE ANN. § 11.11-.33.....14

TEX. TAX CODE ANN. § 11.12 .....3, 13, 14, 16

TEX. TAX CODE ANN. § 21.02(a).....3, 14, 38

TEX. TAX CODE ANN. § 21.02(a)(1).....*passim*

TEX. TAX CODE ANN. § 23.175 8

TEX. TAX CODE § 202.051 8

SUP. CT. R. 10 20

SUP. CT. R. 10(b) 18

SUP. Ct. R. 10(c) 20

SUP. CT. R. 15.2.....5

TABLE OF AUTHORITIES – Continued

Page

SECONDARY SOURCES

1 J. Hellerstein & W. Hellerstein, State Taxation ¶ 4.13[3][a] (3d ed. 2010).....33

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The Midland Central Appraisal District ("appraisal district") seeks a writ of certiorari to resolve a purported conflict between a Texas intermediate appellate court and the Oklahoma Supreme Court. The issue in *In re Assessment of Personal Prop. Taxes Against Mo. Gas Energy*, 234 P.3d 938 (Okla. 2008), *cert. denied*, 130 S. Ct. 1685 (2010) (*Missouri Gas*), was whether the Commerce Clause prohibited a tax on petroleum products removed from a pipeline and placed in a storage facility for several months. At issue in this case, in contrast, is a tax on oil moving quickly in an interstate pipeline system through Texas on its way to out-of-state refineries. Storage was a key factor in *Missouri Gas*. Tariffs in this case prohibited storing oil at the transportation facility. The two cases resulted in different outcomes only because they involved different facts. Thus, there is no conflict for this Court to resolve.

In addition, the Texas intermediate appellate court properly applied the controlling Commerce Clause analysis in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977) to evaluate whether the appraisal district's efforts to tax the oil were proper. The appraisal district does not argue that a different legal test should govern. It instead claims that the intermediate court improperly applied the *Complete Auto* test to the facts at issue here. Asking the Court to supervise and

review particular facts is the kind of error correction in which this Court does not engage.

RESPONSE TO STATEMENT OF JURISDICTION

This Court lacks jurisdiction to review the judgment of the state intermediate appellate court. As detailed below, the intermediate appellate court based its judgment on independent state law grounds. "[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). The Texas Supreme Court denied review of the court of appeals' opinion. Also, there is no conflict on an important federal question. The petition raises error with the application of the facts to a well-established legal principle.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. art. I, § 8, cl. 3: Regulation of Commerce

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

TEX. TAX CODE § 11.01 Real and Tangible Personal Property

> (a) All real and tangible personal property that this state has jurisdiction to tax is taxable unless exempt by law.
>
> (b) This state has jurisdiction to tax real property if located in this state.
>
> (c) This state has jurisdiction to tax tangible personal property if the property is:
>
> > (1) located in this state for longer than a temporary period;
> >
> > (2) temporarily located outside this state and the owner resides in this state; or
> >
> > (3) used continually, whether regularly or irregularly, in this state.
>
> (d) Tangible personal property that is operated or located exclusively outside this state during the year preceding the tax year and on January 1 of the tax year is not taxable in this state.

TEX. TAX CODE § 11.12 Federal Exemptions

> Property exempt from ad valorem taxation by federal law is exempt from taxation.

TEX. TAX CODE § 21.02 Tangible Personal Property Generally

> (a) Except as provided by Subsections (b) and (e) and by Sections 21.021, 21.04, and

21.05, tangible personal property is taxable by a taxing unit if:

> (1) it is located in the unit on January 1 for more than a temporary period;
>
> (2) it normally is located in the unit, even though it is outside the unit on January 1, if it is outside the unit only temporarily;
>
> (3) it normally is returned to the unit between uses elsewhere and is not located in any one place for more than a temporary period; or
>
> (4) the owner resides (for property not used for business purposes) or maintains the owner's principal place of business in this state (for property used for business purposes) in the unit and the property is taxable in this state but does not have a taxable situs pursuant to Subdivisions (1) through (3) of this subsection.

. . .

STATEMENT OF THE CASE

This case involves an ad valorem tax assessed on oil moving through a tank farm facility in Midland, Texas as part of its interstate journey to out-of-state refineries. The Respondents prevailed at trial and on appeal in arguing that the oil was not taxable for several independent reasons, including the application of

state law. The appraisal district failed to convince the Texas Supreme Court of the importance of the issues or of any alleged errors, and the Texas Supreme Court denied review. The appraisal district seeks a writ of certiorari from the state intermediate court of appeals' decision.

Because the appraisal district misstates several key facts, the Respondents BP America Production Company, Amerada Hess Trading Company, Chevron USA, Inc., ChevronTexaco Products Company and ChevronTexaco Global Supply and Trading Company (collectively "Oil Companies"), submit the following factual background based on the trial court's findings of fact.[1] SUP. CT. R. 15.2.

A. Factual background

The Oil Companies and their businesses. The Oil Companies are among the many shippers who move oil through an interstate, FERC-regulated pipeline system that originates in West Texas on its way primarily to out-of-state refineries. Pet. App. 26-27 (FF 2, 3, 6, 12). Once the Oil Companies inject oil

---

[1] The trial court's findings of fact and conclusions of law are in the Clerk's Record 348-54 and are in Petitioner's Appendix 25-35. The Clerk's Record contains documents filed in the trial court and is referenced "CR." The Reporter's Record contains the transcription of the trial testimony and trial exhibits and is referenced "RR" with reference to a volume and page number. Exhibits are referenced "Px" or "Dx." Findings of fact and conclusions of law are referenced "FF" and "CL."

into the pipeline system, the oil becomes part of a common stream and moves under the sole control and custody of pipeline companies who operate the pipeline system. *Id.* (FF 8, 10).

The Oil Companies do not own massive quantities of oil in the Midland Tank Farm. Contrary to the appraisal district's statement, none of the Oil Companies (also known as "shippers") can determine the location of their oil in the pipeline system, much less the tank farm. *Id.* 32 (FF 48, 49, 50). In fact, it is impossible for anyone to identify the location on the pipeline system or ownership of any specific barrel. *Id.* Once a shipper inputs oil into the pipeline system, it has the right to withdraw an equivalent number of barrels. *Id.* 27 (FF 11).

Contrary to the appraisal district's characterization, the oil is not brought to Midland, Texas to sell. Pet. 4-5, 23. The oil is traded throughout the entire pipeline system, and trading does not interrupt the oil's continued movement. Pet. App. 31-32 (FF 43-52). Further, neither the Oil Companies nor the pipeline companies have any business purpose in keeping the oil in Midland, the county that assessed the tax on the oil. RR 2:105; RR 3:112; RR 5:97-98; RR 6:14; RR 7:67, 82. Midland is not a destination for the oil nor are there end-users or refineries in Midland. RR 3:69, 74; RR 5:109. In fact, Texas is not the oil's final destination. Ninety percent of the oil in the Midland Tank Farm leaves Texas for refineries located out of state. Pet. App. 27, 30 (FF 12, 39).

The tanks in the tank farm further transportation; they do not store oil. During its journey to out-of-state refineries, the oil moves through the Midland Tank Farm where it remains for only six to 72 hours. *Id.* 28 (FF 24). The oil travels across Texas in no more than two and a half weeks. *Id.* 31 (FF 42). The tank farm is a part of the pipeline system. *Id.* 28 (FF 19). It is undisputed that the oil was not removed from the pipeline, was not stored in the tank farm, and instead remained in transit through the tank farm. *Id.* 27-30 (FF 14-21, 30-37).

Contrary to the appraisal district's characterization, blending or batching oil in the tank farm does not facilitate marketing. The oil does not travel to the tank farm to be blended as the appraisal district suggests. Pet. 4. Blending and batching are operational functions necessary to facilitate the transmission of the oil and do not interrupt continuity of transit. Pet. App. 29 (FF 25). Only a small portion of oil was blended. RR 5:38; RR 6:12-14; 2:93; 7:24.

Contrary to the appraisal district's repeated theme, the tanks in the Midland Tank Farm cannot store oil; they are solely used to facilitate transportation to out-of-state refineries. Pet. 12-15; Pet. App. 27-30 (FF 12, 19, 21, 30, 31 36, 37, 39). The Midland Tank Farm is not a "depot," "entrepot," "holding tank," or place where the oil is brought to be sold. Pet. 21-22; DCAD amicus Br. 8; Pet. App. 27-30 (FF 12-21, 31-37). Tariffs governing the Midland Tank Farm expressly prohibit storage. 2nd Supp. RR Px 19 (Item 10 p. 6); Dx 22 (Item 11 p. 13); Dx 57 (Item 125 p. 9).

Constant presence of oil. The appraisal district also mischaracterizes the "constant presence" of oil in Midland County. Oil constantly moves through the pipeline and tank farm. RR 3:46-47, 117-18; RR 5:59; RR 7:46; RR 8:27-28; RR 9:127-28. Contrary to the appraisal district's assertion, the pipeline system, which includes the tanks, must have oil in it to operate. Pet. App. 27-30, 32 (FF 15, 17, 24, 30, 39 & 53); RR 3:45-47; RR 5:59-60; RR 6:41-42, 91-92; RR 7:46; RR 8:27-28. The oil in the tank farm, however, is not the same oil from one day to the next. Any accumulation of oil in the tanks is solely to maintain a minimum tank volume incidental to the oil's transmission and is not for storage. Pet. App. 27-30 (FF 14-22, 30-36).

Taxes are paid by the entities receiving governmental services. The Oil Companies are not, as the appraisal district claims, "exempted from taxation." Pet. 8, 10. The pipeline companies, which own and operate the tank farms, pay taxes on the tank farm's pipelines, tanks, and equipment, which is the property that receives governmental services from the Midland County taxing entities. Pet. App. 33 (FF 57). Likewise, the oil is not "exempted." Property taxes are paid on oil in the ground as reserves. TEX. TAX CODE § 23.175 ("TAX CODE"). Production taxes are paid on oil produced in Texas. *Id.* § 202.051; Pet. App. 6, n.3.[2] Further, oil is taxed once it reaches a refinery. Pet. App. 33 (FF 58).

---

[2] The footnote is numbered "3" in Petitioner's Appendix. The footnote is number "1" in the court's opinion.

B. Proceedings below

Before 2003, the appraisal district did not attempt to tax oil in the tank farm or the pipeline system. Pet. App. 26 (FF 4). In 2003, in an effort to increase tax revenue, the appraisal district concluded for the first time that the oil in the Midland Tank Farm was taxable and appraised the oil. The only oil the appraisal district seeks to tax in this lawsuit is the oil moving through the Midland Tank Farm on January 1 of tax years 2003 and 2004.

After exhausting their administrative remedies, the Oil Companies filed the underlying lawsuits challenging the appraisal district's actions.

In the trial court, the Oil Companies challenged taxation on the following bases: (1) the state has no jurisdiction under state law to tax the oil, (2) if taxable under state law, the Commerce Clause of the United States Constitution bars taxation of the oil, (3) if taxable and not exempt, the oil does not have situs under state law to be taxed in Midland County, (4) the appraisal district impermissibly taxed an intangible contract right in violation of state law, and finally, (5) the appraisal district used an illegal method to allocate portions of the oil's value to the Oil Companies, also in violation of state law. CR 70-89; 90-104; 105-23.

Following a bench trial, the trial court concluded that the state lacked jurisdiction to tax the oil under Texas Tax Code § 11.01 and ordered the appraisal district to remove the oil from its appraisal roll.

Resp. App. 1-3. In its findings of findings of fact and conclusions of law, the trial court found for the Oil Companies on three alternative grounds that the oil was not taxable and also found the allocation method was unlawful. Pet. App. 34-35 (CL 1-6).

In affirming the trial court's judgment, the Court of Appeals for the Eleventh District of Texas (Eastland Court of Appeals) discussed two of the three bases for the court's determination that the oil was not taxable. First, the court ruled that the oil had entered the stream of interstate commerce and remained in continuous transit. Pet. App. 10-15. In so holding, the court rejected the appraisal district's argument that the oil was taxable because it was not in the stream of interstate commerce. *Id.* 10-11.

Next, the court addressed the validity of the tax under the Commerce Clause. The court applied the *Complete Auto Transit* factors and concluded that the oil did not have substantial nexus to the state and therefore the tax violated the Commerce Clause. *Id.* 15-18. Alternatively, the appellate court held the tax was improper because the oil remained in Midland County only temporarily and thus did not have situs under state law to allow taxation. *Id.* 18-19. The court did not expressly address whether the state had jurisdiction to tax the oil or reach the validity of the allocation method (which would require remand to the court of appeals).

The appraisal district petitioned for review with the Supreme Court of Texas. The Texas Supreme

Court denied the petition without comment and denied the appraisal district's motion for rehearing. *Id.* 23-24.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The Court should deny the appraisal district's petition for writ of certiorari for several independent reasons. First, there are two jurisdictional bars to this Court's review. Second, in reaching its decision, the intermediate state appellate court decision applied long-standing precedent from this Court. Any purported conflict between the decision under review and the Oklahoma Supreme Court is based on factual distinctions. Finally, the suggested reasons for granting certiorari are contrary to existing Commerce Clause jurisprudence. The substantial nexus element in *Complete Auto Transit* is based on many factors. No factor alone controls the nexus analysis.

I. There is no basis for U.S. Supreme Court jurisdiction.

A. Two adequate and independent state law grounds support the judgment.

The appellate court held that the oil was not taxable based on an adequate and independent state law ground (situs) separate from the federal issue raised in the case. The trial court ruled for the Oil Companies on another state law ground (jurisdiction).

Resp. App. 1-3. In its opinion, the court of appeals addressed situs in detail. Although it did not address jurisdiction except for mentioning the underlying statute, the appellate court affirmed the trial court's judgment that there is no jurisdiction under state law to tax the oil. Resp. App. 4. Accordingly, an opinion from this Court on the federal law issue would be purely advisory and beyond its authority. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

1. State law controls state tax issues.

The appraisal district and TASB amici contend that Texas's jurisdiction to tax is "co-extensive" with the federal constitution to support their argument that the state law grounds are not independent. Pet. 30; TASB amici Br. 18-19.

State law, not federal law, is the source of the state's authority to tax property moving in interstate commerce. *See Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 108 (1994) (states have broad discretion to configure their systems of taxation). The Commerce Clause does not expand the scope of a state's authority to tax property. Under principles of federalism, federal law sets the minimum protections with which all states must comply. *Id.* State law, on the other hand, establishes the ceiling. *LeCroy v. Hanlon*, 713 S.W.2d 335, 338 (Tex. 1986). Thus, even if federal law is not a barrier to a state tax, state law may be a barrier. State law, in other words, cannot "subtract from those rights guaranteed by the United States Constitution," but

nothing prohibits a state from providing additional protections to its citizens. *Sax v. Votteler*, 648 S.W.2d 661, 664 (1983).

Under the Texas ad valorem tax system, the appraisal district must overcome three hurdles to assess an ad valorem tax. First, the state must have jurisdiction to tax the property. Second, the property must not qualify for an exemption. And, finally, if there is jurisdiction and no applicable exemption, then situs (location) must be established in a particular Texas county.

In its argument that there is no independent state law ground, the appraisal district blends these concepts when they are in fact separate and distinct. Pet. 31; TAX CODE §§ 11.01(c)(1); 11.12 & 21.02(a)(1).

The first inquiry in determining taxability of property in Texas is whether the state has jurisdiction. TAX CODE § 11.01(c)(1-3) (establishing state's jurisdiction to tax personal property.) Generally, there is jurisdiction to tax personal property that is located in the state for "longer than a temporary period." *Id.* at § 11.01(c)(1). "More than a temporary period" means more than a limited time based on the owner's intent and type of property. *See Patterson-UTI Drilling Co. v. Webb County Appraisal Dist.*, 182 S.W.3d 14, 16, 18 (Tex. App. – San Antonio 2005, no pet.) (interpreting "temporary period" in the situs statute). If there is no jurisdiction, the inquiry ends and the property is not taxable and no other arguments are reached. This is exactly what the trial court concluded in its judgment. Resp. App. 1-3. Contrary to the

appraisal district's assertion, the court of appeals cited § 11.01, but did not expressly address the issue. Pet. App. 9-10. The court of appeals' judgment, however, affirmed "in all things" the trial court's judgment. Resp. App. 4.

If the state has jurisdiction to tax the property, the next inquiry is whether the property qualifies for an exemption. *See* TAX CODE §§ 11.11-.33. As applicable here, Texas law incorporates federal law. Property exempted under the Commerce Clause is also exempt under state law. *Id.* § 11.12. The court of appeals addressed this issue and, applying *Complete Auto*, concluded that the tax violated the Commerce Clause because no substantial nexus existed. The case cited by the appraisal district recognizes the distinction between jurisdiction and exemptions. *Dallas County Appraisal Dist. v. L.D. Brinkman & Co. (Texas), Inc.*, 701 S.W.2d 20, 22 (Tex. App. – Dallas 1985, writ ref'd n.r.e.).

Finally, if the state has jurisdiction to tax property and it is not exempt, then the last inquiry is where the property is located for tax purposes (situs). TAX CODE § 21.02(a). A property has situs if it is located in a Texas county on January 1 for "more than a temporary period." *Id.* at § 21.02(a)(1). "More than a temporary period" means more than a limited time based on the owner's intent and type of property. *See Patterson-UTI Drilling*, 182 S.W.3d at 16, 18. The court of appeals held that the oil was not taxable because there was no situs under § 21.02(a)(1). Pet. App. 18-19.

2. State law grounds are different than federal law.

The appraisal district suggests that the analysis of the Commerce Clause and situs issues is the same. But they address different matters and are governed by different standards. The state law ground judges the situs of *property* for purposes of state taxation. The Commerce Clause judges the appropriateness of a *tax*.

As it relates to taxing property moving in interstate commerce, jurisdiction and situs under Texas law have a different standard than federal law. Under Texas law, property is not taxable if it is in the state or in a particular county only temporarily, without further inquiry. TAX CODE § 11.01(c)(1); § 21.02(a)(1). Under *Complete Auto*, in contrast, a state tax is analyzed under four factors. Unlike the state law, federal law analyzes more than time in a state and considers additional connections to the state. *Compare* TAX CODE §§ 11.01(c)(1) & 21.02(a)(1) *with Complete Auto Transit, Inc. v. Brady*, 430 U.S. at 279.

The appraisal district contends that if there is nexus under the Commerce Clause, then there is situs under Tax Code § 21.02. Unlike the appraisal district's contention, "nexus" from the Commerce Clause does not overlay onto the "temporary period" in § 21.02(a)(1) and in § 11.01(c)(1). Instead, the state statutes are based solely on time. Further, there is no need for § 11.01(c)(1) (jurisdiction) or § 21.02(a)(1) (situs) to rely on federal law. The state law exemption

provision applicable to property moving in interstate commerce expressly incorporates federal law. TAX CODE § 11.12 ("Property exempt from ad valorem taxation by federal law is exempt from taxation.").

3. The court of appeals treated the Commerce Clause issue separate from the state law situs issue.

Recognizing these principles, the court of appeals reached two separate holdings – one on the Commerce Clause and one on situs. *See Michigan v. Long*, 463 U.S. at 1040-41. Unlike the appraisal district's and TASB amici brief arguments, the court of appeals did not blend its Commerce Clause and situs discussions. Pet. 32; TASB amici Br. 18-19.

First, the opinion reveals that the Commerce Clause and situs holdings are separate and independent grounds. *See Florida v. Powell*, ___ U.S. ___, 130 S. Ct. 1195, 1202 (2010). The court of appeals identified at the beginning of its analysis its ultimate conclusions as separate and distinct: "the tax violated the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, and . . . the tax was not valid under (Texas Tax Code) Section 21.02(a)(1) due to the temporary period during which the oil was located in Midland County." Pet. App. 10. The court discussed the Commerce Clause and situs in separate parts of the opinion delineated by separate headings, one entitled, "Validity of Tax Under Commerce Clause,"

and the other entitled, "Validity of Tax Pursuant to State Law." *Id.* 15, 18. The opinion's distinct sections provide a "plain statement" that the decision rested on two separate grounds, one of which is an independent and adequate state law matter. *Long*, 463 U.S. at 1040-41. In its concluding paragraph of the appraisal district's appeal, the court again reiterated the separateness of the holdings. Pet. App. 19 (tax not valid under the Commerce Clause *or* § 21.02(a)(1)).

Second, the court of appeals did not treat situs and the Commerce Clause issue as "interchangeable and interwoven." *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 163-65 (1917); *cf. Florida v. Powell*, 130 S. Ct. at 1202. In its situs discussion, the court did not cite or incorporate federal law. Pet. App. 18-19; *cf. Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984). Instead, the court cited the state law provision and proceeded to discuss the facts that demonstrated that the oil was not in Midland County for more than a "temporary period." Pet. App. 18-19 (oil "merely traveled through Midland County," "any delay" was temporary).

Finally, that the court looked to the same facts to support its two independent holdings is not controlling. For example, in *Diamond Shamrock*, the Texas Supreme Court looked to the same facts – stored oil, removed from transit in its state of final destination – to find both nexus and situs. *Diamond Shamrock Ref.*

& Mkt'g Co. v. Nueces County Appraisal Dist., 876 S.W.2d 298, 304 (Tex. 1994).

B. There is no conflict and no important federal question.

On the recommendation of the U.S. Solicitor General that there was no conflict warranting review, this Court denied certiorari in a similar case last year. Brief for the United States as Amicus Curiae at 7-9, 11-12, *Missouri Gas,* (08-1458). Nothing has changed since the Solicitor General's recommendation. *Id.* 7. The potential for conflict between Texas (if the Texas Supreme Court granted review) and Oklahoma foreshadowed by the Solicitor General did not materialize.

The Texas Supreme Court denied review of this case twice. Pet. App. 23-24. First, after requesting full briefing, the Texas Supreme Court denied the appraisal district's petition for review. *Id.* 23. The Court again denied review after a protracted motion for rehearing process that involved numerous filings both by the appraisal district and by amicus curiae that supported the appraisal district's position. *Id.* 24. The Texas Supreme Court also denied review in *Peoples Gas, Light, & Coke Co. v. Harrison Cent. Appraisal Dist.*, 270 S.W.3d 208 (Tex. App. – Texarkana 2008, pet. denied), *cert. filed*, No. 10-896, involving a similar issue from a different appellate district.

Without a Texas Supreme Court opinion, there is no conflict as contemplated by Rule 10(b). *See* SUP.

CT. R. 10(b) (jurisdiction based on conflicting decisions from state courts of last resort). The rule envisions the states' highest courts weighing in after issues have developed and "matured" in the state's lower courts. As the DCAD amicus brief and LCAD amici brief demonstrate, this issue may arise again in numerous Texas counties. Most of the counties identified in the amici briefs must take their appeals from district court judgments to different appellate districts than the court of appeals here. This diversity of review would allow the potential for other intermediate appellate courts to consider the issue before the Texas Supreme Court decides to weigh in. Thus, as it relates to Texas, the issue is not fully developed to support conflict jurisdiction.

Even considering the intermediate court of appeals' opinion, there is no conflict with the Oklahoma Supreme Court to support this Court's jurisdiction. *See* 28 U.S.C. 1257(a). The Oklahoma Court addressed the constitutionality of a tax on natural gas removed from a pipeline and placed in storage for seven months. The court here addressed the constitutionality of a tax on oil moving through a pipeline system that was not stored and that moved through the entire state in two and a half weeks. Both courts applied *Complete Auto* in their Commerce Clause analyses to different facts. The difference in outcomes is attributable to disparate facts. If there is no direct conflict because of factual differences, denial of certiorari is justified. *Bunting v. Mellen*, 541 U.S. 1019,

1021 (2004) (Stevens, J., joined by Ginsburg and Breyer, JJ., respecting denial of certiorari).

Finally, because the two courts agreed on the applicable law, there is no important federal question involved and no legal issue of continuing importance. SUP. CT. R. 10(c); *United States v. Johnson*, 268 U.S. 220, 227 (1925) ("we do not grant a certiorari to review evidence and discuss specific facts.") The issue in this case is not a question of which law applies but a question of application of the facts to a well-settled legal analysis. SUP. CT. R. 10 (certiorari rarely granted with "misapplication of a properly stated rule of law"). This Court decided the "important federal question" more than thirty years ago in *Complete Auto Transit v. Brady*. The appraisal district does not propose using different law or modifying the analysis. Instead, the appraisal district is asking this Court to review a purely factual matter – which facts should be considered in the substantial nexus analysis. That request is nothing more than error correction: reassess the facts and reach a different result. One of the appraisal district's amicus briefs concedes as much: "the Court of Appeals simply applied the *Complete Auto* test to the facts at hand incorrectly and should have found that, under the facts presented, the *Complete Auto* Test is completely and wholly satisfied." DCAD amicus Br. 10.

II. The state court of appeals applied the correct legal standard and reached the right result.

The only issue before this Court is whether a state ad valorem tax on oil moving in an interstate pipeline violates the Commerce Clause and specifically, if the oil has a substantial nexus to the state. The appraisal district's argument in support of its petition is based on an analysis that considers only one factor in the *Complete Auto* analysis – constant presence – and ignores all other factors. This is contrary to the law and misstates the court of appeals' analysis.

A. The state court of appeals applied *Complete Auto.*

The Court set out the proper Commerce Clause analysis for state taxes on property moving in interstate commerce. *Complete Auto Transit*, 430 U.S. at 279-87. Under *Complete Auto*, the Commerce Clause does not prohibit an existing state tax if the tax: (1) applies to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Id.* at 279-80.

The court below applied the correct standard – *Complete Auto* – in its Commerce Clause analysis. Pet. App. 15-18. The court considered a variety of factors to reach its conclusion that the oil lacked a substantial nexus to the state to justify the tax. *Id.*

5-9; 17-18. The oil moved in an interstate pipeline system that prohibited storage. The oil was not removed from transit. The oil's time in the Midland Tank Farm was brief and only served to further its transportation to out-of-state refineries. Under these facts, the court properly concluded that at the moment the oil was taxed it was "present but in transit," and thus had no substantial nexus. *Id.* 17-18.

B. The appraisal district misconstrues the state court of appeals' opinion.

In its petition, the appraisal district tries to create the impression that the court applied the "continuity of transit" analysis instead of applying *Complete Auto*. Pet. 8, 9, & 20. The court of appeals' opinion refutes the appraisal district's argument. As the Solicitor General noted, "various state courts [specifically identifying the court of appeals here] have applied the *Complete Auto* factors, rather than the 'continuity of transit' test, in adjudicating dormant Commerce Clause challenges to local taxation." Br. for U.S. (08-1458), at 11.

The Oklahoma Supreme Court in *Missouri Gas* debated whether to apply the "continuity of transit" analysis or *Complete Auto*. By contrast, the court below did not view the Commerce Clause issue as a choice between "continuity of transit" on the one hand and *Complete Auto* on the other. Pet. App. 15-16. The court correctly applied *Complete Auto* and concluded that there was no substantial nexus. *Id.* 15-18.

The appraisal district assails the continuity of transit discussion in the opinion. Pet. 19. The court of appeals' discussion of continuity of transit, however, was made at the appraisal district's behest. The analysis the appraisal district now criticizes and uses as a basis for certiorari review is the same analysis it urged the court of appeals to follow.

In the court of appeals, the appraisal district argued that the oil was taxable because it was no longer in transit. Pet. App. 10-11. According to the appraisal district, "an analysis of whether property is moving in a way that will trigger constitutional scrutiny is going to involve the questions of when the property entered the taxing state, how long it stayed, and when it left." MCAD Appellant's Br. 22 (11-07-00048-CV).

Under the appraisal district's argument in the court of appeals, had the oil not been in transit, the Commerce Clause would not have been invoked and the oil would have been taxable. Pet. App. 10-15; *Marathon Ashland Petroleum L.L.C. v. Galveston Cent. Appraisal Dist.*, 236 S.W.3d 335, 338 (Tex. App. – Houston [1st Dist.] 2007, no pet.) (if not in the stream of interstate commerce, then taxable with the general mass of property).

In response to the appraisal district's argument that the oil was not in transit, the court of appeals discussed the continuity of transit analysis and concluded that the oil had entered and remained in the stream of interstate commerce. Pet. App. 10-15.

Finally, as the Solicitor General recognized in the Oklahoma Supreme Court's analysis in *Missouri Gas*, the court of appeals' analysis here satisfies *Complete Auto* and the continuity of transit test. *See* Br. for U.S. (08-1458), at 14.

III. Existing law refutes the appraisal district's reasons for granting certiorari.

The appraisal district raises three arguments for granting certiorari all relating to the substantial nexus element of *Complete Auto*: 1) consider only the property's constant presence, 2) ignore continuity of transit, and 3) ignore the "activity" being taxed. As detailed below, the appraisal district's narrow, fact-based arguments are contrary to existing law and present nothing new for this Court to review. The appraisal district's final argument for granting certiorari raises grounds that have never been in dispute in the lawsuit.

A. "Constant presence" alone does not satisfy the substantial nexus factor.

The appraisal district suggests that this Court should decide if constant presence "is sufficient to establish nexus under *Complete Auto*." Pet. 14. Under its argument, the oil is constantly present in Midland County, and that fact alone creates substantial nexus. The appraisal district's argument is contrary to existing law and misconstrues the opinion below.

1. The appraisal district's argument is contrary to existing law.

There is no support for the notion that a single factor, like constant presence, controls the substantial nexus analysis in *Complete Auto*. As this Court has explained, "Commerce Clause jurisprudence now favors more flexible balancing analyses." *Quill Corp. v. North Dakota*, 504 U.S. 298, 314 (1992); *see also D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 32-33 (1988) (nexus based on many factors); *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 778 (1992) (requiring a connection between property, person or transaction being taxed). None of these references comports with a single factor controlling a Commerce Clause determination.

In addition, the appraisal district's constant presence argument requires segregation of the tanks in the Midland Tank Farm from the pipeline system to create its purported "storage" and constant presence. The appraisal district did not attempt to tax the oil in the pipeline upstream or downstream of the tank farm. In fact, the appraisal district's expert agreed that oil in the pipeline was in transit and not taxable. RR 9:130-31; RR 10:35-37. Long-standing oil and gas pipeline jurisprudence refutes separating a pipeline system into segments.

This Court has viewed pipeline systems as a whole, not as independent, component parts. As this Court observed ninety years ago, tanks are "pipe(s) of a larger size" in an interstate pipeline system much

like the pipeline system that travels through West Texas and through the Midland Tank Farm. *See Eureka Pipe Line Co. v. Hallanan*, 257 U.S. 265, 272 (1921). According to the Court, if "the oil runs into a tank on one side and out on the other[,][t]he tank may be regarded as a pipe of a larger size." *Id.*

Similarly, in *Maryland v. Louisiana*, 451 U.S. 725 (1981), the Court observed that "we do not agree that the flow of gas from the wellhead to the consumer, even though 'interrupted' by certain events, is anything but a continual flow of gas in interstate commerce . . . during the entire journey." *Id.* at 755; *see also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 295 n.1 (1988) ("underground gas storage facilities are a necessary and integral part of the operation of piping gas from the area of production to the area of consumption.")

These cases describe the pipeline system of which the Midland Tank Farm is a part and how it operates. The tanks in the Midland Tank Farm exist to further transportation and are a part of an interstate pipeline system. They do not store oil or interrupt the overall movement of the oil.

2. The appraisal district's cases do not support a one-factor test.

The cases on which the appraisal district relies do not support the argument that constant presence alone determines substantial nexus. Two of its cases

are storage cases and two do not involve substantial nexus disputes.

The appraisal district relies heavily on *Missouri Gas*. That case, however, did not turn on a single factor in its nexus analysis but on a host of factors. The issue in *Missouri Gas* was the taxability of "storage gas." *Missouri Gas*, 234 P.3d at 948, 954. The gas had been removed from the pipeline and pursuant to storage service contracts placed in storage tanks in a storage facility for up to seven months. *Id.* at 943, 944, 947. The Oklahoma Supreme Court acknowledged the cyclical nature of natural gas demand. *Id.* at 944-45.

The Oklahoma court concluded in light of these factors the storage gas had a substantial nexus to justify the state's tax. *Id.* at 954-55. The court specifically limited its holding to stored natural gas. *Id.* at 954. The court recognized, however, that "actual movement" of property deprives it of the requisite nexus under *Complete Auto*. *Id.* at 954, n.46.

Diamond Shamrock v. Nueces County Appraisal District, also a storage case, is likewise no support. It too turned on many factors, not solely constant presence of stored oil. The oil in that case was imported from foreign sources and placed in a storage facility awaiting transport to a refinery. 876 S.W.2d at 299. The Texas Supreme Court relied heavily on the fact that Texas was the oil's state of final destination – referring to that fact eleven times in the opinion.

Id. at 298, 299, 300-01, 302, 302 n.6, 302 n.7 & 303. The Texas Supreme Court also based its decision on the fact that the oil was stored and "at rest" in the county. *Id.* at 303. It contrasted that fact with oil in continuous transit as follows: "oil passing through a county *without stopping*, in pipelines or on trucks, would thus not be located in that county 'for more than a temporary period' so as to allow taxation under the Code," and would not have nexus. *Id.* at 302-04 (emphasis added).

The appraisal district's two other cases do not involve substantial nexus disputes. Contrary to the appraisal district's description of the case as "approving the tax," in *Japan Line, Ltd. v. County of Los Angeles*, the Court held that a tax on shipping containers used exclusively in foreign commerce was unconstitutional under the Commerce Clause. 441 U.S. 434, 453-54 (1979). The Court did not address substantial nexus. *Id.* at 451 ("Assuming, *arguendo*, that the tax passes muster under *Complete Auto*, it cannot withstand scrutiny under either of the additional tests that a tax on foreign commerce must satisfy.") Instead, the Court struck the tax under the Commerce Clause because it resulted in multiple taxation and prevented the federal government from speaking with one voice in international trade. *Id.* at 453-54. The case at bar does not involve foreign commerce.

Finally, in *Commonwealth Edison Company v. Montana*, the Court upheld a severance tax on coal. 453 U.S. 609, 617-29 (1981). Commonwealth Edison

did not challenge substantial nexus, and instead challenged only the third and fourth elements of *Complete Auto*. *Id.* at 617. Unlike a severance tax, the ad valorem tax in this case is not on oil in the ground or on oil coming out of the ground. The tax assessed was on oil already produced from the ground from multiple counties, placed in an interstate pipeline moving through a tank farm on its way out of state. Pet. App. 26 (FF 5).

3. The court below properly rejected "constant presence" as controlling.

As *Missouri Gas* and *Diamond Shamrock* demonstrate, the facts that make a property constantly present must be considered. In each case, isolating constant presence reveals virtually nothing about the legal ruling. To use constant presence of the oil alone ignores the specific characteristics of the oil and gas transmission and is contrary to *Missouri Gas* and *Diamond Shamrock*. In both cases, the courts considered the totality of the circumstances, including the kind of property, the mode of transportation, actual movement, actual time involved, and the owner's business. No single factor created substantial nexus. Yet, that is the argument the appraisal district asks this Court to adopt.

In its analysis, the court of appeals recognized that substantial nexus is guided by many factors. Contrary to the appraisal district's contention, the court below did not find a lack of nexus because the

oil is "in interstate commerce." Pet. 13. Rather, it found no nexus because the oil was in transit through the state when the tax was assessed. Pet. App. 18. As the opinion explains, the oil moved through Midland County in a matter of hours. Ninety percent of the oil was leaving for out-of-state refineries. The oil moved in an interstate pipeline system of which the tanks were an integral part.

The court below applied the same controlling legal precedent as in *Missouri Gas*, and in fact expressly distinguished the holding in *Missouri Gas* based on the disparate facts. As the court of appeals noted, the facts that made the gas and the oil constantly present in *Missouri Gas* and in *Diamond Shamrock* were different than the facts in this case. In those cases, product was removed from the pipeline and stored. Here, the oil is not removed from the pipeline but continues in transit through a tank farm and is not stored. Pet. App. 29-30 (FF 30-36). As *Missouri Gas* and *Diamond Shamrock* recognized, such movement defeats substantial nexus. *Missouri Gas*, 234 P.3d at 954, n.46; *Diamond Shamrock*, 876 S.W.2d at 302, 304.

Further, in rejecting constant presence, the court of appeals applied the reasoning of a controlling Texas Supreme Court case that, as an intermediate court of appeals, it is required to do. *Virginia Indonesia Co. v. Harris County Appraisal Dist.*, 910 S.W.2d 905, 907, 912 (Tex. 1995) (owner had property constantly present in Houston for 45-175 days, but it was not the same property). In rejecting constant presence

as a controlling factor, the Texas Supreme Court relied on *Carson Petroleum Co. v. Vial*, 279 U.S. 95, 99-101 (1929), which held that constantly present goods remained in interstate commerce. *Id.* at 913-14.

B. "Continuity of transit" is a factor in the nexus analysis.

The appraisal district suggests that continuity of transit is not a consideration in the nexus analysis. Pet. 15. Cases refute its argument and unlike the appraisal district's characterization, the court of appeals did not rely solely on continuity of transit.

1. Courts consider continuity of transit.

Many cases recognize the continued use of "continuity of transit" in a Commerce Clause nexus analysis, including the case on which the appraisal district bases its entire petition, *Missouri Gas*.

In *D.H. Holmes*, decided eleven years after *Complete Auto*, this Court recognized the continued purpose of the continuity of transit test. In *D.H. Holmes*, the Court addressed a Commerce Clause challenge to a tax on property that had been delivered to its state of final destination. The Court noted that the distinction between property at rest or in the stream of interstate commerce "may be of some importance for other purposes (*in determining, for instance, whether a 'taxable moment' has occurred*), but for Commerce Clause analysis it is largely irrelevant." *D.H. Holmes*, 486 U.S. at 31 (emphasis added) (internal citation

omitted). Whether a taxable moment has occurred makes little difference in a case where the state assessing the tax is the state of final destination. *See id.*

Determining a "taxable moment," however, is critical if the state assessing the tax is a state other than one of final destination. *See Diamond Shamrock*, 876 S.W.2d at 304 (oil passing through in pipelines would not be in a county for more than a temporary period to allow taxation). With oil delivered in its state of final destination, the Texas Supreme Court applied *D.H. Holmes* and observed that the "continuity of transit" analysis may be "questionable, at least as to goods *which have entered the state of their final destination.*" *Id.* at 302, n.7 (emphasis added).

Similarly, the Oklahoma Supreme Court in *Missouri Gas*, also relying on *D.H. Holmes*, recognized the continued viability of the continuity of transit analysis. It explained that

> goods that move continuously through a state in the course of an interstate journey without stopping are no more amenable to local taxation under [*Complete Auto Transit v.*] *Brady* than they were under the historical analysis, but the reason is not simply that they are 'in transit in interstate commerce.' Rather, it is because their actual movement deprives them of the degree of nexus with the taxing state that would justify the tax under the first prong of the *Brady* analysis.

Missouri Gas, 234 P.3d at 954, n.46.

The Solicitor General explained in *Missouri Gas*:

> Still, the 'continuity of transit' cases remain potentially relevant to the constitutional analysis. In cases like this one, the same factors that the Court previously considered to determine continuity of transit may inform the first prong of the *Complete Auto* inquiry – *i.e.*, whether the relevant goods have a constitutionally sufficient nexus to the taxing State.

Br. for U.S. (08-1458), at 12 (citing *Diamond Shamrock*, 876 S.W.2d at 302).

As the Solicitor General in *Missouri Gas* recognized, the Oklahoma Court did not ignore "continuity of transit." In describing the court's holding, the Solicitor General opined that the "holding reflects a sound application of the first ('substantial nexus') prong of the *Complete Auto* test, as well as comporting with the 'continuity of transit' cases focusing on the purpose of the interruption." *Id.* at 14.

The treatise on which the appraisal district relies is contrary to these cases and the Solicitor General's opinion in *Missouri Gas*. Pet. 27 (citing 1 J. Hellerstein & W. Hellerstein, State Taxation ¶ 4.13[3][a] (3d ed. 2010)).

2. Cases cited do not support the appraisal district's argument.

The appraisal district tries to bolster its argument by alleging other courts have struggled with the

application of the "in transit" analysis. Pet. 17-19. The cases cited either: 1) did not involve a Commerce Clause question, 2) involved the Commerce Clause, but not a dispute over nexus and were resolved on another element of *Complete Auto*, 3) applied *Complete Auto* to different facts, or 4) involved intermediate appellate courts applying "continuity of transit," whose state supreme courts later applied *Complete Auto*.

Several of the cases cited by the appraisal district do not involve a Commerce Clause issue. *Norandex, Inc. v. Limbach*, 630 N.E.2d 329, 333-34 (Ohio 1994) (distinguishing *American Steamship Co. v. Limbach*, 572 N.E.2d 629 (Ohio 1991) on the grounds that it did not address a Commerce Clause issue and recognizing that only questions under the Commerce Clause were whether there was a "taxable event" and whether the *Complete Auto* test was satisfied); *Kentron, Inc. v. State Bd. of Tax Comm'rs*, 572 N.E.2d 1366, 1367-68, 1372 (Ind. Tax Ct. 1991) (stored property awaiting out-of-state shipment was not in interstate commerce and the Commerce Clause did not apply); *Predka v. Iowa*, 186 F.3d 1082, 1084-85 (8th Cir. 1999) (transporting marijuana is not protected by the Commerce Clause).

The appraisal district also cites cases that involved Commerce Clause issues but were resolved on another element of *Complete Auto* other than substantial nexus. *T.A. Operating Corp. v. State of Florida, Dep't of Revenue*, 767 So.2d 1270, 1274, 1272, n.3; 1272-76 (Fla. Dist. Ct. App. 2000) (court applied

Complete Auto; owner did not dispute substantial nexus); *Sterling Custom Homes, Inc. v. Comm'r of Revenue*, 1985 WL 6207 (Minn. Tax. 1985), *aff'd*, 391 N.W.2d 523, 525 (Minn. 1986) (court upheld a state tax under the third element of *Complete Auto* that the tax did not discriminate against out-of-state manufacturers).

Other cases simply applied *Complete Auto* to different facts and reached results contrary to the court here. *Havill v. Gurley*, 382 So.2d 109, 111 (Fla. Dist. Ct. App. 1980) (substantial nexus under *Complete Auto* with products stored in a warehouse whether considered in transit or not); *Mississippi State Tax Comm'n v. Murphy Oil USA, Inc.*, 933 So.2d 285, 289-90, 293-94 (Miss. 2006) (substantial nexus under *Complete Auto* with franchise tax where nexus turned on whether income from business of storing and selling oil was derived from activities conducted within the state).

Finally, to the extent the appraisal district located cases that refer to the continuity of transit test, they are intermediate appellate courts whose state supreme courts later applied *Complete Auto*. *Chesapeake and Potomac Telephone Co. of Maryland v. Comptroller of the Treasury*, 528 A.2d 536 (Md. Ct. Spec. App. 1987) (interstate journey ended with delivery into destination state and could be taxed there), *aff'd*, 561 A.2d 1034, 1036-37 (Md. 1989) (found substantial nexus based on *Complete Auto* and *D.H. Holmes*). As the Solicitor General pointed out in rejecting a similar conflicts argument in *Missouri*

Gas, while two intermediate appellate court decisions cited continuity of transit – *Mississippi River Transmission Corp. v. Simonton*, 442 So.2d 764 (La. Ct. App. 1983) and *United Gas Pipe Line Co. v. Whitman*, 390 So.2d 913 (La. Ct. App. 1980) – the Louisiana Supreme Court subsequently applied *Complete Auto* to Commerce Clause challenges. Br. for U.S. (08-1458), at 11-12 (citing *Columbia Gulf Transmission Co. v. Broussard*, 653 So.2d 522, 523-24 (La. 1995) and *Word of Life Christian Ctr. v. West*, 936 So.2d 1226, 1241-42 & n.17 (La. 2006)).

3. The court of appeals considered the oil's actual movement.

Contrary to the appraisal district's argument, the court of appeals did not use the "continuity of transit" analysis as an automatic disqualifier for nexus. Instead, the in transit movement of the oil was one factor in the court's analysis. The oil is not in its state of final destination. As the findings of fact reveal, more than ninety percent of the oil leaves Texas. At the time the oil was taxed, it was in actual transit.

C. This Court has endorsed consideration of "activities" in the nexus analysis.

In its last point about substantial nexus as a ground for certiorari review, the appraisal district contends that the court of appeals erroneously based its nexus analysis on the owners' "activities" instead of the property. Pet. 24-26; TASB amici Br. 13-15. The

appraisal district misinterprets the court's reference to "activities of the taxpayer" and overlooks the applicable law. Pet. 9. The court did not focus on the Oil Companies' activities. Instead, the court focused on the oil's movement. In addition, this is an issue in *Peoples Gas* (No. 10-896), but not in the Oil Companies' case. The appraisal district's argument here is simply an attempt to paint this case onto *Peoples Gas*'s canvas.

The court of appeals concluded that the oil had nexus with the *state* as the oil is produced in Texas and a small portion ends up at Texas refineries. Applying the precise terminology used in *Complete Auto*, the court, however, concluded that "the 'activity' being taxed had no such nexus." Pet. App. 17-18. "The 'activity' essentially being taxed in this case was the ownership of oil that was present but in transit on January 1 in a tank farm that constituted an integral part of an interstate, common carrier pipeline system." *Id.*; *see Complete Auto*, 430 U.S. at 279 (tax may be upheld when it is "applied to an *activity* with a substantial nexus with the taxing State") (emphasis added); *see also Allied-Signal, Inc.*, 504 U.S. at 777 (there must be a definite link between a "state and the person, property or transaction it seeks to tax").

Ad valorem taxes in Texas are assessed by counties, not by the state. Thus, the court of appeals' reference to "activity being taxed" is referring to the oil's connection to Midland County. Contrary to the appraisal district's argument, Texas taxes are not "measured solely by the value of the property"

without consideration of the "amount and type of activity." Pet. 25; *see* TAX CODE §§ 11.01(c) & 21.02(a). The court's discussion relates solely to describing the property being taxed–oil moving through a county on January 1 that was part of an interstate common carrier pipeline system. The court of appeals made no mention of the Oil Companies' activities, their offices, or employees in Texas. And, as the appraisal district recognizes, the court of appeals never cited *Quill*, which addressed taxes based on the physical presence of an owner.

D. The Oil Companies never challenged the other *Complete Auto* factors.

The appraisal district's final ground relates to matters that have never been in dispute in this case. Pet. 28-29. The Oil Companies' sole challenge to the *Complete Auto* factors involved only the first element – substantial nexus. The other elements were not before any court below and cannot be raised now. The appraisal district's argument about them should be disregarded.

IV. Amici offer no compelling grounds for granting certiorari.

The amici repackage and rehash the arguments in the petition. To the extent additional arguments are raised, none support this Court's certiorari review.

Amici contend that there is uncertainty or confusion in Texas law. DCAD amicus Br. 4; LCAD amici

Br. 3; TASB amici Br. 1. But clarifying the law among state intermediate appellate courts does not warrant Supreme Court review. In any event, the law in Texas on product moving in interstate commerce is not uncertain or confusing as shown in the case below and in *Peoples Gas* – both of which reached the same conclusion on similar facts. Finally, amici's suggestion is incorrect that a loss of revenue as a result of this case impacts Texas taxing entities. The oil in this case has never been taxed. The taxes in dispute are not money that Texas taxing entities ever had in their coffers. This is not a case of property that had been taxed for many years and then was determined to be not taxable. Rather, the appraisal district began for the first time to appraise and tax the oil moving through the tank farm in 2003. CR 349. Until 2003, the appraisal district never considered the oil in the tank farm taxable and did not tax it.

V. The Court should deny certiorari in this case and in *Peoples Gas*.

This Court should deny the petitions for writ of certiorari in this case and in *Peoples Gas* (10-896). The state intermediate appellate courts in both cases applied this Court's Commerce Clause jurisprudence as well as controlling Texas Supreme Court authority to reach the same conclusion: If property has entered the stream of interstate commerce and remains in uninterrupted transit, it has no substantial nexus to justify the tax.

Nonetheless, the TASB amici alternatively suggest that the Court should stay this case pending the outcome of *Peoples Gas*. TASB amici Br. 17. Given the overlap in issues, the Oil Companies are concerned about the implications for them if the Court grants review in *Peoples Gas* and denies or stays this case.

A decision by this Court in *Peoples Gas* likely will be construed as addressing all pipeline transportation cases. As the two cases demonstrate, however, there are significant distinctions between oil and natural gas production, transportation, marketing and ultimate usage that affect the legal issues before the Court. Further, the owner in *Peoples Gas* relies extensively on an issue not present in this case – lack of ownership of the gas. Ownership is not an issue in this case. In addition, the Oil Companies raise different issues and rely on important factual distinctions that affect the legal issues involved.

Thus, if the Court grants the petition in *Peoples Gas*, it should simultaneously grant this case to allow the Oil Companies to fully participate and the related, but distinct, issues to be heard.

CONCLUSION

For these reasons, Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

LYNNE LIBERATO
Counsel of Record
HAYNES AND BOONE, LLP
1221 McKinney, Suite 2100
Houston, Texas 77010-2007
Telephone: (713) 547-2000
Lynne.Liberato@haynesboone.com

LAURIE RATLIFF
IKARD & GOLDEN, P.C.
400 W. 15th St., Suite 975
Austin, Texas 78701
Telephone: (512) 472-6695
Lratliff@ikardgolden.com

Attorneys for Respondents BP America Production Company, Amerada Hess Trading Company, Chevron USA, Inc., ChevronTexaco Products Company and ChevronTexaco Global Supply and Trading Company

NO. CV44864 (consolidated)

BP AMERICA PRODUCTION COMPANY, Plaintiff, v. MIDLAND CENTRAL APPRAISAL DISTRICT, Defendant.	§ § § § § § § § §	IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS 238th JUDICIAL DISTRICT

NO. CV44867

AMERADA HESS TRADING COMPANY, Plaintiff, v. MIDLAND CENTRAL APPRAISAL DISTRICT, Defendant.	§ § § § § § § § §	IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS 385th JUDICIAL DISTRICT

NO. CV44863

CHEVRON USA, INC., CHEVRONTEXACO PRODUCTS COMPANY, and CHEVRONTEXACO GLOBAL SUPPLY AND TRADING COMPANY, Plaintiffs, v. MIDLAND CENTRAL APPRAISAL DISTRICT, Defendant.	§ § § § § § § § § § § §	IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS 142nd JUDICIAL DISTRICT

NO. CV44865

TEPPCO CRUDE OIL LLC and TEPPCO CRUDE P/L LLC	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	MIDLAND COUNTY, TEXAS
v.	§	
MIDLAND CENTRAL APPRAISAL DISTRICT,	§	238th JUDICIAL DISTRICT
Defendants.	§	

FINAL JUDGMENT

(Filed Dec. 22, 2006)

Beginning on October 9, 2006, the above-styled and numbered cause of action was presented for trial before this Court. Each party appeared by its attorneys of record and announced that it was ready to present evidence.

All matters in controversy, legal and factual, were submitted to the Court for its determination without a jury until all the parties rested on November 3, 2006. The Court heard the evidence and arguments of counsel and, on November 30, 2006, returned its decision for Plaintiffs, announcing that judgment would be rendered. The Court renders judgment pursuant to Texas Tax Code section 42.24.

1. It is, therefore, ordered, adjudged and decreed that Plaintiffs' property that is the subject of this lawsuit is not taxable during tax years 2003 and 2004 pursuant to Texas Tax Code §11.01.

2. It is further ordered, adjudged and decreed that Defendant shall remove all of Plaintiffs' property that is the subject of this lawsuit from the Midland Central Appraisal District appraisal roll for tax years 2003 and 2004.

3. It is further ordered that Plaintiff shall recover court costs from Defendant as provided in Texas Tax Code §42.07 as approved by the Court in the final bill of costs.

4. It is further ordered that Defendant shall comply with all postappeal administrative procedures as set out in Subchapter C of the Texas Tax Code, sections 42.41 through 42.43.

5. Plaintiffs' request for attorneys' fees based on Texas Tax Code section 42.29 is denied.

6. This judgment disposes of all claims and all parties and is, therefore, a final and appealable judgment.

SIGNED on the 22nd day of December, 2006.

/s/ John G. Hyde
The Honorable Judge
John G. Hyde

11TH COURT OF APPEALS
EASTLAND, TEXAS
JUDGMENT

Midland Central Appraisal District,

Vs. No. 11-07-00048-CV

BP America Production Company et al,

* From the 238th District Court of Midland County, Trial Court No. CV44864 (consolidated)
* March 26, 2009
* Opinion by Wright, C.J. (Panel consists of: Wright, C.J., McCall, J., and Strange, J.)

This court has inspected the record in this cause and concludes that there is no error in the judgment below. Therefore, in accordance with this court's opinion, the judgment of the trial court is in all things affirmed. The costs incurred by reason of this appeal are taxed against Midland Central Appraisal District.

184 (7)

Supreme Court, U.S.
FILED
MAR 22 2
OFFICE OF THE CLERK

No. 10-890

In The Supreme Court of The United States

MIDLAND CENTRAL APPRAISAL DISTRICT,
Petitioner,

v.

BP AMERICA PRODUCTION CO., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE 11TH DISTRICT AT EASTLAND

PETITIONER'S REPLY BRIEF

KIRK SWINNEY
McCreary, Veselka, Bragg & Allen, P.C.
700 Jeffrey Way, Suite 100
Round Rock, Texas 78665-2425
(512) 323-3200
kswinney@mvbalaw.com
Counsel for Petitioner

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
ARGUMENT 1

I. State law grounds 2

A. Trial court judgment 2
B. Court of appeals decision 3
C. Allocation 5
D. State limitations on taxability 6

II. Commerce Clause issues 7

A. Ownership of oil 7
B. Constant presence of substantial quantities establishes nexus 8
C. In transit analysis is erroneous 9
D. Activities analysis 11
E. Distinguishing *Missouri Gas* 12

III. An inconsequential case driven by facts? ... 12

TABLE OF AUTHORITIES

CASES

Complete Auto Transit v. Brady,
430 U.S. 274 (1977) 2, 10

D.H. Holmes Co. v. McNamara,
486 U.S. 24 (1988) 10

Dallas Cty. Appraisal Dist. v. L.D. Brinkman & Co., Inc., 701 S.W.2d 20 (Tex. App—Dallas 1985, writ ref'd n.r.e.) 6

Diamond Shamrock Refining and Marketing Co. v. Nueces County Appraisal District, 876 S.W.2d 298 (Tex.1994) 4, 8, 10

Exxon Corp. v. San Patricio County Appraisal District, 822 S.W.2d 269 (Tex.App.—Corpus Christi 1991, writ denied) 4, 9, 10

In re Assessment of Personal Property Taxes Against Missouri Gas Energy, 234 P.3d 938 (Okla. 2008), *cert. denied*, 130 S.Ct. 1685 ..... 5, 8, 12

Lawrence v. Texas, 539 U.S. 538 (2003) 13

Maryland v. Louisiana, 451 U.S. 725 (1981) 11

Michigan v. Long, 463 U.S. 1032 (1981) 6

Midland Central Appraisal Dist. v. BP America Production Co. et al., 282 S.W.3d 215 (Tex. App.—Eastland 2009, pet. denied) 3, 4, 10

Neese v. Southern Railway Co.,
350 U.S. 77 (1955) 3

Pennhurst State School & Hospital v Halderman, 451 U.S. 1 (1981) 6

Peoples Gas, Light, & Coke Co. v. Harrison Central Appraisal District, 270 S.W.3d 208 (Tex. App.—Texarkana 2008, pet. denied) 5

VanDevender v. Woods, 222 S.W.3d 430 (Tex. 2007).3

STATUTES

Texas Tax Code § 11.01 ..... 2, 4

Texas Tax Code § 11.12 2

Texas Tax Code § 21.02 ..... 3, 4

Texas Tax Code § 42.24 2

OTHER AUTHORITIES

Brief of U.S. as *Amicus Curiae* in *Missouri Gas Energy v. Schmidt*, No. 08-1458 at 21..... 8, 13

In the Matter of the Appeals of *Various Applicants* from an Order of the Director of Property Valuation of the State of Kansas for the Year 2009, Nos. 2009-8554-PV, *et al.*,..... 12

Petition for a Writ of Certiorari, *Harrison Central Appraisal Dist. v. Peoples Gas Light & Coke Co.*, No. 10-896 (U.S. Dec. 30, 2010)..... 12

CONSTITUTIONAL PROVISIONS

Tex. Const., Art. VIII, § 2 6

IN THE
SUPREME COURT OF THE UNITED STATES

MIDLAND CENTRAL APPRAISAL DISTRICT,
Petitioner,

v.

BP AMERICA PRODUCTION CO., *et al.*,
Respondents.

ARGUMENT

Petitioner Midland Central Appraisal District (MCAD) responds to the Briefs in Opposition by Respondents Teppco Crude Oil, L.L.C. and Teppco Crude P/L, L.L.C. (Teppco), and by BP America Production Co., *et al.*, collectively referred to as BP *et al.*

I. State law grounds

A. Trial court judgment

Teppco alleges that the decision of the trial court mentions nothing about federal law issues and cites to Texas Tax Code §§ 42.24 and 11.01 as its authority. However, § 42.24 is the general jurisdictional statute for trial courts to review the administrative decisions on property tax matters in Texas. It would be cited by a trial court as its authority regardless of the nature of its underlying rationale. Furthermore, in its conclusions of law nos. 3 and 6 the trial court specifically concluded on federal constitutional issues. The decisions of Texas trial courts are not accompanied by extensive legal analyses. The wording of the judgment itself is not illuminating to the trial court's rationale.

Teppco further alleges that the decisions below were based on Texas Tax Code § 11.12. Teppco Brief at 3. That allegation MCAD admits. This section, however, only reads that if property is exempt under federal law, then it is exempt. That portion of the Texas Tax Code hardly seems to be independent of federal law.

Further, the court of appeals specifically found that the trial court had made a determination that the oil was in the stream of interstate commerce and failed to meet the "substantial nexus" requirement of *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). *Midland Central Appraisal Dist. v.*

BP America Production Co. et al., 282 S.W.3d 215, 221-24 (Tex. App.—Eastland 2009).

B. Court of appeals decision

Teppco further claims that the decision below was based primarily on state law issues and only "incidentally" addressed federal constitutional issues. That is an unlikely claim in light of the 2,484 words which the opinion devotes strictly to analysis of interstate commerce versus the 185 words which it uses to address the state law issues, inclusive of some federal analysis.

Teppco describes the discussion of the court of appeals on federal law issues as being merely necessary to address MCAD's issues on appeal. Teppco Brief at 2. However, as is pointed out by Teppco at 6, a court is required to address state law issues first and only resort to federal constitutional issues if necessary. *VanDevender v. Woods*, 222 S.W.3d 430, 432-33 (Tex. 2007). Therefore, if the court of appeals had at its disposal a singularly sufficient state law ground, it should have ruled on that issue alone without so much as "wad[ing] in to ancillary constitutional issues." *Id.* at 432. *See also, Neese v. Southern Railway Co.*, 350 U.S. 77, 78 (1955).

Furthermore, the court clearly depended its state law ruling on Texas Tax Code § 21.02 on its interstate commerce holding. It distinguished the cases of *Diamond Shamrock Refining and Marketing Co. v. Nueces County Appraisal District,* 876 S.W.2d

298 (Tex.1994) and *Exxon Corp. v. San Patricio County Appraisal District,* 822 S.W.2d 269 (Tex.App.—Corpus Christi 1991) from the instant case solely on the finding that the oil in this case was proceeding out of state whereas the oil in the other two cases was not going out of state. In each of the other cases, *Exxon* and *Diamond Shamrock*, oil in tanks was found to have situs and jurisdiction to tax in Texas under circumstances identical to the facts at issue herein, save for the fact that the oil at issue herein is in some measure traveling out of state after it leaves Midland. *Midland v. BP*, 238 S.W.3d at 221.

The same argument addresses the issue BP *et al.* raise concerning a three part analysis to determine whether a Texas jurisdiction may assess a property tax on a property: 1) Is there jurisdiction to tax under Tex. Tax Code § 11.01; 2) Is the property exempt; and, 3) Does the property have situs under Tex. Tax Code § 21.02? BP *et al.* at 13-14. MCAD does not fundamentally disagree. BP *et al.* fail to note two things, however. One, the test for jurisdiction to tax and situs are essentially the same, that is whether the property is located in the state and locality for more than a temporary period of time, and, two, that, as noted above, those issues have been determined adversely to the Respondents in *Diamond Shamrock* and *Exxon*. The court of appeals distinguished this case from those by the interstate destination of the oil. *Midland v. BP*, 238 S.W.3d at 221-22. I.e., the court's ruling on §§ 11.01 and 21.02 was dependent on its finding of the protected interstate transit of the oil. If the

interstate transit does not shield the oil from taxation, BP's analysis fails. That segues into and leaves only the federal exemption issue on which the court of appeals based its decision.

C. Allocation

Teppco raises the red herring issue of the trial court's findings regarding the allocation of the oil in question. That issue is irrelevant and certainly does not preclude jurisdiction in this Court because it has nothing to do with whether the oil is taxable. It has only to do with how much oil is taxable to what oil company. The court of appeals did not reach the issue. If it had, it would have and should have remanded the issue back to the trial court for determination of how much oil was specifically taxable to each oil company. The amount of oil in the tanks, the amount of oil owned by each of the Respondents in the system, and the amount each had ordered shipped to the Midland tank farms are known quantities. From that information, the trial court should not have excessive difficulty determining how much oil each Respondent owned in the tank farms any more than the courts in *In re Assessment of Personal Property Taxes Against Missouri Gas Energy*, 234 P.3d 938 (Okla. 2008), *cert. denied*, 130 S.Ct. 1685 and *Peoples Gas, Light, & Coke Co. v Harrison Central Appraisal District*, 270 S.W.3d 208 (Tex. App.—Texarkana 2008) had in determining how much gas each gas owner had in the respective storage field. The issue before this Court, as was before the courts below, is whether the

oil is taxable, not how much is taxable to any particular oil company.

Besides, this Court's jurisdiction is not thwarted by the possibility that a state court may sometime in the future pronounce another state law reason to affirm. *See, e.g., Pennhurst St. School & Hosp. v Halderman*, 451 U.S. 1, 9, 30-31 (1981). It is only thwarted by the plain statement of the state court that its ruling is based on independent, adequate, bona fide state law ground not interwoven with federal law, a statement not present here. *Michigan v. Long*, 463 U.S. 1032 (1981).

D. State limitations on taxability

BP *et al.* claim that Texas has limited its ability to tax beyond federal restrictions. BP *et al.* Brief at 12. However, they cite no authority to establish that Texas has so limited its power in this incident, or indeed in any case, other than the opinion below which is here challenged. Indeed, by the Texas Constitution, Art. VIII, § 2, the state's power to tax is coextensive with federal limitations. The state legislature cannot further restrict that power by exemption or by definition of its jurisdiction to tax. *Dallas Cty. Appraisal Dist. v. L.D. Brinkman & Co., Inc.*, 701 S.W.2d 20, 23 (Tex. App. – Dallas 1985).

II. Commerce Clause issues

A. Ownership of oil

Although BP *et al.* disparage several of the facts as recited by MCAD, and MCAD asserts the accuracy of all its fact recitations, only one deserves comment: They allege that they do not own large quantities of oil in the Midland tank farms but that the location of their oil is undeterminable. That is misleading, to phrase the reply courteously.

The Midland tank farms are the only significant tankage and terminal collecting point of the Midland Pipeline System. The evidence below indisputably established that: 1) all of the Respondents placed into that system immense quantities of oil during all of the years in question: 2) that the Respondents paid the pipeline operators to transport that oil to the Midland tank farms: and 3) that as of each valuation date in question, as with every date between, the tanks farms were able, willing and contractually obligated to deliver as the Respondent's directed every drop of that oil at the Midland tank farms. The evidence further indicated that the Respondents usually sold that oil at the Midland tank farms to third parties. The oil in the tank farms is at least as locatable and its ownership attributable as the Oklahoma Supreme Court and Texarkana Court of Appeals found the gas to be in the respective gas fields. RR 2:69-70; 3:18, 30-34, 118-19; 4:47; 5:18-19, 68-72, 86-87, 95; 6:79-81; 6:57, 61, 73; 7:27-30, 40-46, 54-56, 75-86, 96; 9:48-65;

11:11-50; 12:13-14; 13:28-32, 59, 113-118; DX 7, 16, 27, 33-55, 75-94.

What BP *et al.* mean when they claim that no one can determine the location of a specific barrel of oil in the system is that once oil is placed in the pipelines or tank farm it loses its identity and can no longer be specifically located. However, the tank farms deliver quantities from a fungible mass, not specific drops of oil.

B. Constant presence of substantial quantities establishes nexus

The ownership of the oil at the tank farms leads to the next point. BP *et al.* assail MCAD's position that the constant presence of large quantities of oil is in itself sufficient to establish nexus. BP *et al.* Brief at 24-31.

On the one hand, BP *et al.* are simply wrong. *Missouri Gas* explicitly cited the large quantities of gas stored for a substantial portion of the year as the basis for nexus. *Missouri Gas,* 234 P.3d at 954-55. The Solicitor General noted that in Brief of U.S. as *Amicus Curiae* in *Missouri Gas Energy v. Schmidt*, No. 08-1458 at 21. Further, the court in *Diamond Shamrock* likewise explicitly held the year round presence of large quantities of oil in the taxing jurisdiction as the basis for nexus. 876 S.W.2d at 303. There is nothing in that case to indicate that the court therein found that the 12-25 days out of a year which specific drops of oil were "stored" amounted to a sufficient portion of the year to

amount to either nexus or situs. Also, *Exxon* patently turns on the constant presence of large quantities of the oil. *Exxon*, 822 S.W.2d 273-73.

But, on the other hand, the fact that there is not a case from this Court specifically holding that the constant presence of a large quantity of an inventory, though constantly changing, is part of MCAD's point. The question begs for a ruling to resolve this issue.

BP *et al.* also misstate MCAD's position by claiming the MCAD contends that the constant presence of the massive quantities of oil is the sole factor for determining nexus. BP *et al.* Brief at 24. MCAD does not dispute that other factors can lead to a finding of nexus. But, MCAD does contend that the constant presence of massive quantities of oil does in itself establish nexus notwithstanding that the individual units of the oil come and go quickly. Indeed, that issue is the heart of this case. One barrel of oil is just as flammable, just as toxic, just as in need of labor and services, and just as draining on local resources as the previous or next barrel. The fact of constant movement or exchange of barrels of oil or mcfs of gas or pallets of widgets does not alter the imposition on the locality of a constantly present inventory.

C. In transit analysis is erroneous

BP *et al.* allege that the court of appeals properly considered the continuity of transit doctrine and applied it, and that the court did not utilize

continuity of transit concepts in determining that the tax failed the nexus prong of the *Complete Auto* test. *Complete Auto*, 430 U.S. at 279. But, the language of the case indicates otherwise. Note that the court in finding failure of nexus distinguishes *Diamond Shamrock* and *Exxon* on the basis that the oil was "in transit on January 1 in a tank farm that constituted an integral part of an interstate, common carrier pipeline system." *Midland v. BP*, 282 S.W.3d at 224. The court went on to worry that if it found nexus in this case, then "in transit" oil in the pipeline would also be taxed. *Id.*

BP *et al.* attempt to convert *Diamond Shamrock* into a case that supports their "in transit" theories, quoting language that oil merely passing through the county such as on trucks or in pipelines would be "in transit" in such as way as not to support nexus. But, the whole point of *Diamond Shamrock* is that oil in tanks, even though "in transit," is *not* like oil in pipelines. In the tanks it accumulates in massive quantities. *Diamond Shamrock*, 876 S.W.2d at 303.

Likewise, BP *et al.* attempt to convert to a supporting case *D.H. Holmes* in which this Court held that whether a good is in transit is "largely irrelevant" to the analysis of the tax under *Complete Auto*. *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 30-31 (1988). The Court's language indicating that whether a good is in transit may bear on whether a "taxable moment" has occurred is inapplicable here. "Taxable moments" occur in transaction or activities based taxes, such as a sales tax. At issue here is a

property tax which is assessed based on the presence and value of property, not a transaction.

Unavailing also is BP *et al.*'s cite to *Maryland v. Louisiana*, 451 U.S. 725 (1981) wherein the Court noted the uninterrupted passage of offshore gas through Louisiana to customers beyond that state and struck down a Louisiana tax that patently discriminated against gas in interstate commerce. Other than that discriminatory nature of the tax, the case is distinguishable in that it did not involve any constant presence of significant quantities of gas.

D. Activities analysis

BP *et al.* argue both that the court below did not base its analysis on the activities of the Respondents and that it is entirely appropriate to analyze the activities of the owners in considering nexus for a property tax. BP Brief *et al.* at 36-38.

That the court below did look at activities of the owners seems beyond doubt when one considers the specific language of the opinion holding that, "The activity essentially being taxed in this case was the ownership of oil that was present but in transit on January 1 . . ." Apparently, the court below did not examine the activities extensively though. Otherwise it would have found that the Respondents trade oil extensively in Midland, own leases and transportation contracts to Midland, own tank farms, and have employees in Midland. RR 4:91; 5:51-52; 6:81-83; 7:61-62, 99.

But, that is not the point. A property tax is a tax on property that is present for more than a temporary period of time, not a tax on the activities of an owner such as a franchise or sales tax. The cases cited by BP *et al.* for the proposition of examining activities concern other types of taxes.

E. Distinguishing *Missouri Gas*

BP *et al.* attempt to distinguish *Missouri Gas*. Trusting that the issue was addressed in its Petition, MCAD only notes that if *Missouri Gas* is so distinguishable, BP *et al.* should have no fear of a grant of certiorari in the petition in *Harrison Central Appraisal Dist. v. Peoples Gas Light & Coke Co.*, No. 10-896 (U.S. Dec. 30, 2010), a case by all accounts factually indistinguishable from *Missouri Gas*.

III. An inconsequential case driven by facts?

BP *et al.* spend much of their brief minimizing the importance of this case and claiming it is highly fact driven. Every case that comes before this Court comes with a set of facts. It is the application of the law to a set of facts that seems highly repeatable as noted in the Petition and the several briefs by *amici*. Similar facts in *Missouri Gas* lead this Court to seek the opinion of the Solicitor General. The same issue, though involving gas, is now pending in Kansas. In the Matter of the Appeals of *Various Applicants* from an Order of the Director of Property Valuation of the State of Kansas for the Year 2009, Nos. 2009-8554-PV, *et al.*, Court of Tax Appeals. Of course, the

concurrent petition of Harrison CAD accentuates the issue.

Further, this Court often reviews final decisions of intermediate courts on important issues. *See, e.g., Lawrence v.* Texas, 539 U.S. 538 (2003).

When the Solicitor General in her brief in the *Missouri Gas* petition cited the below decision as aberrant, she recommended denial of Missouri Gas' petition not because the opinion below was inconsequential or because it was of an appellate court only, but because the Texas Supreme Court still had opportunity to bring Texas into national harmony. Brief of U.S. as *Amicus Curiae* in *Missouri Gas Energy v. Schmidt*, No. 08-1458 at 7-8. That opportunity has passed.

BP *et al.* suggest this Court continue to let contradictory opinions on an issue involving hundreds of millions of tax dollars to accumulate. But, the issues are already framed and the diversity of results has occurred. The time for resolution is now.

Respectfully submitted,

Kirk Swinney
McCREARY VESELKA
BRAGG & ALLEN, P.C.
700 Jeffrey Way, Suite 100
Round Rock, Texas 78665
Telephone: (512) 323-3200
Telecopier: (512) 323-3294
kswinney@mvbalaw.com

Supreme Court, U.S.
FILED
FEB 10 2011
OFFICE OF THE CLERK

No. 10-890

In The Supreme Court of the United States

Midland Central Appraisal District,
Petitioner,

v.

BP America Production Co., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Texas Court of Appeals, Eleventh Appellate District

BRIEF OF CHAMBERS COUNTY APPRAISAL DISTRICT, LIBERTY COUNTY CENTRAL APPRAISAL DISTRICT, SMITH COUNTY APPRAISAL DISTRICT, AND THE TEXAS ASSOCIATION OF APPRAISAL DISTRICTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Michael Darlow*
Robert Mott
Sandra Griffin
Christopher Jackson
Perdue Brandon Fielder Collins & Mott LLP
3301 Northland Drive, Suite 505
Austin, Texas 78731
(512) 302-0190
mdarlow@pbfcm.com

* *Counsel of Record*

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

REASONS TO GRANT THE PETITION FOR WRIT OF CERTIORARI 3

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

A. Overview 5
1. The Texas *Ad Valorem* Appraisal And Tax Structure 5
2. Location of Petroleum Products In Texas 6
3. This Issue Has A Substantial Impact On *Amici* 7

B. This Matter Gives The Court An Opportunity to Further Address the Commerce Clause, Especially In Regards to *Ad Valorem* Taxation 11

C. This Matter Grants The Court An Opportunity to Clarify Whether the Applicability of the Physical Presence Test to *Ad Valorem* Taxes and Further Explore What Constitutes "Substantial Nexus" 17

D. By Granting the Petition and Deciding This Case the Court Would Resolve the Disagreement Between Texas and Oklahoma, Equalizing The Demand on Government Services 20

CONCLUSION 24

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Allied-Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768 (1992) 19

Coe v. Town of Errol, 116 U.S. 517 (1886) 12, 13, 14

Commonwealth Edison Co. v. Mont., 453 U.S. 609 (1981) 21

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) ..... *passim*

General Oil v. Crain, 209 U.S. 211 (1908) 12, 15

Gibbons v. Ogden, 9 Wheat. 1 (1824) 18

Hughes Bros. Timber v. State of Minn., 272 U.S. 469 (1926) 12

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 23

Kelley v. Rhoads, 188 U.S. 1 (1903) 12

Minn. v. Blasius, 290 U.S. 1 (1933) 12

Nat'l Bellas Hess v. Ill. Dep't of Revenue, 386 U.S. 753 (1967) 19

Quill Corp. v. N.D., 504 U.S. 298 (1992) 18, 19

Reeves, Inc. v. Stake, 447 U.S. 429 (1980) 17

Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) 14

Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) 7

STATE CASES

Atascosa County v Atascosa County Appraisal Dist., 990 S.W.2d 255 (Tex. 1999) 5-6

In re Assessment of Pers. Prop. Taxes Against Mo. Gas Energy, 234 P.3d 938 (Okla. 2008), *cert denied*, 130 S. Ct. 1685 (2010) 4, 10, 21

Marathon Ashland Petroleum L.L.C. v. Galveston Cent. Appraisal Dist., 236 S.W. 3d 335 (Tex. App.—Houston [1st Dist.] 2007, no pet.) 13-14

Midland Cent. Appraisal Dist. v. BP Am. Prod. Co., 282 S.W.3d 215 (Tex. App. – Eastland 2010 pet. denied) 4, 15, 20-21

Peoples Gas, Light and Coke Co. v Harrison Cent. Appraisal Dist., 270 S.W.3d 208 (Tex. App—Texarkana 2008, pet. denied) 4, 20

Virginia Indonesia Co. v. Harris County Appraisal Dist., 910 S.W.2d 905 (Tex. 1995), *cert. denied*, 518 U.S. 1004 (1996) 14

CONSTITUTIONS, STATUTES AND REGULATIONS

U.S. CONST., art. I, § 8, cl. 3 17

4 U.S.C. § § 116-126 17

15 U.S.C. § 381 17

TEX. CONST. art. VIII, § 1(a) 5

TEX. CONST. art. VIII, § 1(b) 5

TEX. CONST. art. VIII, § 11 5

TEX. TAX CODE ANN. § 6.01 (West, Westlaw through 2009 Reg. Legis. Sess.) 2, 6

TEX. TAX CODE ANN. § 11.01 (West, Westlaw through 2009 Reg. Legis. Sess.) 5

TEX. TAX CODE ANN. § 11.45(a) (West, Westlaw through 2009 Reg. Legis. Sess.) 6

TEX. TAX CODE ANN. § 32.07(a) (West, Westlaw through 2009 Reg. Legis. Sess.) 23

MISCELLANEOUS

AMERICAN PETROLEUM INSTITUTE, http://www.api.org/policy/americatowork/upload/JOBS_TEXAS.pdf 2

CNN, *Fire burning at Texas natural gas facility*, http://www.cnn.com/2011/US/02/08/texas.plant.fire/ 22

HOUSTON CHRONICLE, *Plant burns in Mont Belvieu Enterprise Products operates facility in Chambers Co.*, http://www.chron.com/disp/story.mpl/metropolitan/7418224.html.....22

KHOU, *Multiple explosions, fire at Mont Belvieu plant*, http://www.khou.com/news/cnn/Explosions-fire-at-Mont-Belvieu-plant--115579109.html 22

Paul Hartman, *Federal Limitations on State and Local Taxation* 383 (1981). 13

1 J. Hellerstein & W. Hellerstein, *State Taxation* (3d ed. 2010) 19, 23

U.S. ENERGY INFORMATION ADMINISTRATION, *Estimated Natural Gas Pipeline Mileage In The Lower 48 States, close of* 2008, http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/mileage.html 1

U.S. ENERGY INFORMATION ADMINISTRATION, *U.S. Underground Natural Gas Storage Facilities*, close of 2007, http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/undrgrndstor_map.html 2

Pursuant to Rule 37 of this Court, the Chambers County Appraisal District, the Liberty County Central Appraisal District, the Smith County Appraisal District of Texas and the Texas Association of Appraisal Districts (hereinafter "the Districts")[1] respectfully submit this brief in support of the Petitioner, the Midland Central Appraisal District, in the above-captioned matter.[2] The *amici curiae* urge that the petition for a writ of certiorari be granted and the decision of the Texas Court of Appeals, Eleventh Appellate District be reversed.

INTEREST OF THE *AMICI CURIAE*

At the end of 2008, there were over 217,000 miles of interstate pipelines in the United States and over 58,000 miles of pipeline in Texas.[3] Approximately, 1,772,335 jobs are supported by the natural gas and petroleum industries in Texas. These jobs add $293.8 billion to Texas' gross state product, or 24.2% of its

---

[1] In accordance with Rule 37 6, *amici* state that no counsel for a party has authored this brief, in whole or in part. No person or entity, other than *amici curiae*, have made a monetary contribution to the preparation or submission of this brief

[2] In accordance with Rule 37 2(a), *amici* state that the counsel of record for all parties received notice of their intention to file a brief in support of the Petitioner at least 10 days prior to the due date for the brief Written consent of the Petitioner and Respondent was obtained from their counsel of record

[3] U.S ENERGY INFORMATION ADMINISTRATION, *Estimated Natural Gas Pipeline Mileage in the Lower 48 States, Close of 2008*, http://www.eia doe gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/mileage html (last visited Feb 8, 2011).

wealth.[4] Texas has an enormous amount of infrastructure relating to transporting, gathering, modifying and storing petroleum products. At the end of 2007, there were approximately 400 underground natural gas storage facilities in the United States. Many of these storage facilities were located in Texas.[5] In addition, several other types of storage or gathering facilities that exist in Texas for products other than natural gas that are shipped in interstate and intrastate commerce, such as oil and manufactured goods. Therefore, the issue of appraising and taxing stored goods in interstate commerce is a significant concern for Texas property tax authorities.

Like the Petitioner, the Districts are all political subdivisions of the State of Texas. *See* Tex. TAX CODE ANN. § 6.01(c) (West, Westlaw through 2009 Reg. Legis. Sess.). Moreover, like the Petitioner, interstate pipelines operate and store natural gas with other petroleum and industrial products in the Districts' jurisdiction.

The Chambers County Appraisal District, the Liberty County Central Appraisal District, the Smith County Appraisal District of Texas, the Texas

---

[4] AMERICAN PETROLEUM INSTITUTE, http://www.api.org/policy/americatowork/upload/JOBS_TEXAS.pdf (last visited Feb. 8, 2011)

[5] U.S. ENERGY INFORMATION ADMINISTRATION, *U.S. Underground Natural Gas Storage Facilities, Close of 2007*, http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/undrgrndstor_map.html (last visited Feb. 8, 2011)

Association of Appraisal Districts[6] and other appraisal districts in this country need clear guidance from this Court on what properties they can include on their property tax rolls. The taxing units that the *amici* appraise for also are significantly impacted because they depend on revenue from such properties to provide critical governmental services.

REASONS TO GRANT THE PETITION FOR WRIT OF CERTIORARI

Because the annual *ad valorem* appraisal and potential taxation of oil, other petroleum products and other goods in interstate commerce present recurring issues for these Districts and the taxing units they appraise for in Texas (in addition to many others throughout the United States) the Court should grant the Petitioner's writ of certiorari.

By granting the petition for writ of certiorari in this case the Court would have the opportunity to: (1) address the correct application of the four part "test" this Court set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) to an *ad valorem* tax matter, which would be an issue of first impression;

---

[6] The Texas Association of Appraisal Districts, Inc. is a statewide, voluntary non-profit organization incorporated and organized to promote the effective and efficient functioning and administration of appraisal districts in Texas In 2010, more than 90 percent of the state's 254 appraisal districts belong to TAAD, as well as numerous tax officials from school districts, cities, counties, state agencies and other entities, and other property tax professionals. TAAD, *About Us*, http //www.taad.org/about_us.html (last visited Feb 8, 2011)

(2) address the impact of the *Complete Auto* case on this Court's precedents regarding the ability of State and local taxing units to assess *ad valorem* taxes on goods stored by a common carrier prior during intrastate intermingled with interstate transit; (3) provide taxpayers as well as state and local taxing units needed guidance as what constitutes "substantial nexus" under the first prong of the *Complete Auto* Test; and (4) resolve the disagreement and confusion regarding the constitutional limitations on a local or state taxing entity's ability to impose an *ad valorem* tax on large quantities of petroleum products continually present in a given location that currently exists between Texas and Oklahoma.[7]

SUMMARY OF THE ARGUMENT

Imposition of an *ad valorem* tax on oil located in large tank farms in Texas, pending transport via an interstate pipeline to out-of state owners does not violate the Commerce Clause of the U.S.

---

[7] Texas courts in this matter and one regarding Harrison Central Appraisal District, have determined that the Commerce Clause *prohibits* state *ad valorem* taxation of stored natural gas in an interstate pipeline system *See Peoples Gas, Light and Coke Co v Harrison Cent Appraisal Dist*, 270 S.W 3d 208 (Tex. App—Texarkana 2008, pet. denied); *Midland Cent. Appraisal Dist v BP Am. Production Co*, 282 S.W.3d 215 (Tex App —Eastland 2010 pet. denied) The Supreme Court of Oklahoma has held that the Commerce Clause *permits* such a tax *See In re Assessment of Personal Prop. Taxes Against Mo Gas Energy*, 234 P.3d 938, 959 (Okla. 2008), cert denied, 130 S Ct 1685 (2010) This conflict means petroleum products on an interstate pipeline located in Oklahoma is taxable but under the similar facts is not in Texas

Constitution. By granting the petition for writ of certiorari, this Court can confirm this conclusion and further its Commerce Clause jurisprudence, especially as it relates to *ad valorem* taxation. Ever mindful of the Court's admonition in Rule 37.1 to not burden it with repetitious arguments, we defer to the Petitioner, Midland Central Appraisal District's brief on behalf of the *amici* for most arguments.

ARGUMENT

A. Overview

1. The Texas Ad Valorem Appraisal and Tax Structure.

Article VIII, section 1 of the Texas Constitution requires that all real and tangible personal property used for the production of income, unless exempt, be taxed "in proportion to its value, which shall be ascertained as may be provided by law." TEX. CONST. art. VIII, § 1(b); *see also* TEX. TAX CODE ANN. § 11.01 (West, Westlaw through 2009 Reg. Legis. Sess.). It also requires that taxation be "equal and uniform." TEX. CONST. art. VIII, § 1(a). The Texas Constitution further requires that "all lands and other property not rendered for taxation by the owner thereof shall be assessed at its fair value by the proper officer." TEX. CONST. art. VIII, § 11.

The Texas Tax Code codifies the constitutional obligation of our state government to appraise and assess property for purposes of taxation. *See Atascosa County v. Atascosa County Appraisal Dist.*,

990 S.W.2d 255, 257 (Tex. 1999). As a part of this codification, the Texas Legislature in the Tax Code created appraisal districts to begin operation January 1, 1982, as political subdivisions of the state. *See* TEX. TAX CODE ANN. § 6.01 (West, Westlaw through 2009 Reg. Legis. Sess.). This statute establishes an appraisal district in each county and makes the appraisal district responsible for appraising property in the district for *ad valorem* tax purposes of each taxing unit that imposes *ad valorem* taxes on property in the district.

Consequently, the appraisal districts are the Texas entities that must determine the taxability of all real and personal property for all local governments that impose a property tax. The appraisal districts must make the determination as to whether a particular property is taxable or exempt. *See* TEX. TAX CODE ANN. § 11.45(a) (West, Westlaw through 2009 Reg. Legis. Sess.). Therefore, the appraisal districts must annually determine whether goods are exempted by operation of the Dormant Commerce Clause.

2. Location of Petroleum Products in Texas

Texas produces more crude oil than any other state in the nation (excluding federal off shore production). West Texas Intermediate (WTI) is the benchmark for crude oil in the United States. Most WTI is destined for Midwest refineries via interstate pipelines. More than one-fourth of the total refining capacity of the United States is in Texas. The Houston area is the largest refining center in the

United States and interstate pipelines spread from the Houston area across the country.[8]

In addition to oil, every day millions of cubic feet of natural gas are transported through interstate pipelines in the United States. Pipelines transport natural gas from producing states such as Texas and Oklahoma to markets in other states such as California, Michigan, Ohio, and New York.

"Underground gas storage facilities are a necessary and integral part of the operation of piping gas from the area of production to the area of consumption." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 295 n.1 (1988).

The principal owners/operators of underground storage facilities are interstate pipeline companies. If a storage facility serves interstate commerce, it is subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC).

3. This Issue Has A Substantial Impact on *Amici*.

The State of Texas has an enormous amount of oil and natural gas in transit or in storage at any given time. Oil pipelines transport more crude oil and refined petroleum products in the United States than

---

[8] U.S. ENERGY INFORMATION ADMINISTRATION, http //www eia doe gov/state/state_energy_profiles cfm?sid=TX (last visited Feb. 8, 2011).

any other means of transportation.[9] The U.S. Energy Information Administration reports monthly crude oil stocks at tank farms and in pipelines. In 2010, slightly over one million barrels of crude oil stock was available at any given time (1,089,256 barrels in June 2010, for example). Of that amount, the majority is in the United States Strategic Petroleum Reserves (726,591 barrel in June 2010). The next largest amount of the stock, about one-fourth, is located in pipelines or tank farms (242,377 barrels).[10] Approximately one-half of the product located in pipelines and tank farms is located within PADD 3, which are the gulf coast states. (PADD refers to Petroleum Administration for Defense Districts.) Thus it is clear that at any given time, a significant amount of crude oil is in Texas pipelines or tank farms.

Smith County Appraisal District appraises for all the taxing entities within Smith County, Texas. Smith CAD has several oil tank farms within its jurisdiction. The market value of the oil in tanks in Smith County is over $65,000,000.

In addition to tank farms located across Texas, the State also has enormous storage capacity for natural gas. These underground caverns contain a total storage capacity of 355,740,000 barrels of product

---

[9] U.S ENERGY INFORMATION ADMINISTRATION, http://www.eia.doe gov/oiaf/servicerpt/ulsd/chapter4 html (last visited Feb 8, 2011)

[10] U S. ENERGY INFORMATION ADMINISTRATION, http //www eia.gov/dnav/pet/pet_sum_crdsnd_k_m htm (last visited Feb 8, 2011)

according to the Texas Railroad Commission H10-H reports. These domes are located under the City of Mont Belvieu, Texas. The 31 caverns have 117 injection wells for insertion and removal of stored product.

Normally those caverns may only operate at 17 or 18% of their total capacity. In dollar terms, for the recent tax years in 2008, $1,318,252,170 was the taxable value, with $146,964,020 exempted, in 2009, $919,095,870 in value was taxed, $136,161,120 was exempted and in 2010, $901,638,200 was taxed, $361,143,150 was exempted. The amounts exempted were based upon this Court's prior rulings prohibiting taxation of property in the hands of a common carrier for interstate shipment. The taxing authority attempted to include only product in storage for this purpose.

Perhaps most important for the Court's consideration is that the benefits and protections afforded to the owners of taxable, intrastate bound product and exempt interstate bound product are identical. The product of one owner, stored in a portion of the same facility, will be taxed because it has an in-state destination, while the product of another will be exempt because it has an out-of-state destination and is in a storage cavern owned by and connected to an interstate common carrier pipeline. In one case, a company owns two caverns, one connected to an interstate pipeline and the other connected to an intrastate pipeline, with the two caverns connected to each other. That company can

transfer the product between the two caverns to suit its business needs.

Of *amici*, the facts in Chambers County are most similar to the facts in the present case and in *In re Assessment of Personal Property Taxes Against Missouri Gas Energy*, 234 P.3d 938, 959 (Okla. 2008), *cert denied*, 130 S. Ct. 1685 (2010). Most, but not all, of the product stored is produced in Texas refining facilities or chemical plants. Other storage facilities are utilized for natural gas. Those products that are bound for out-of-state delivery are in the hands of the common carrier pipeline. The interstate journey for most begins at the facility. Much of the product has been purchased for out-of-state delivery while awaiting shipment at the storage facility, just as was the case in Oklahoma. *Id.* at 943. The seminal issue regarding most of the stored products in Chambers County is when the interstate journey begins. The interstate pipelines mostly begin at this location. However, as with other facilities, some stored product at this location may have been delivered from refineries or gas fields in other states or foreign nations, thus prompting the need to determine whether interstate transit has been interrupted by the owner's business needs or by storage necessary for interstate transit.

Liberty County Central Appraisal District also possesses salt domes with working gas capacity in the billions of cubic feet in its jurisdiction. Liberty County's salt domes are proximate to interstate and intrastate pipelines, along other facilities. There is

currently $443,321,400 worth of inventory contained in storage caverns within Liberty County, Texas.

Also within the Liberty County Appraisal District is a rail yard, where millions of dollars worth of product sits in railcars at any given time. The product is sent there to wait for orders from customers. Once the order is received, the car is sent out. However, like the storage tank farm in this case, the rail yard is used to store product for the convenience and business purpose of the owner until the owner needs the product. For the 2010 Tax Year, there was $276,418,970 worth of taxable product sitting in the rail yard on January 1. That amount of value represents 43% of the appraisal roll of the City of Dayton, Texas.

B. This Matter Gives The Court An Opportunity to Further Address the Commerce Clause, Especially In Regards To *Ad Valorem* Taxation.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), this Court overruled a line of decisions which established a *per se* bar to the taxation of property in interstate commerce. In doing so, it adopted a four-prong test for deciding whether a particular state tax survives Commerce Clause scrutiny. A state tax will be sustained if it: (1) is applied to an activity with a substantial nexus to the taxing State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State. *Id.* at 279.

Ad valorem taxes are assessed by state and local governments across the United States. *Ad valorem* taxes are one of the primary pillars supporting the services state and local governments provide. By granting certiorari and addressing the issues in this case, the Court, in a matter if first impression, could address the *Complete Auto* Test as it relates to *ad valorem* taxes on massive amounts of goods constantly present in a jurisdiction, in interstate commerce.

Presently most of the property tax issues concerning taxation of interstate commerce are issues related to the taxation of goods stored incident to interstate and intrastate transit. Most issues involving the instrumentalities of commerce have been resolved utilizing *Complete Auto* standards. The law concerning taxation of goods stored incident to interstate and intrastate commerce, however, is governed by rules which substantially predate the *Complete Auto* decision. Those rules were developed in eras where commerce was substantially slower and simpler. They involve taxation of lumber being transported by river (*Coe v. Town of Errol*, 116 U.S. 517 (1886), *Hughes Bros. Timber v. State of Minn.*, 272 U.S. 469 (1926)); cattle in stockyards (*Minn. v. Blasius*, 290 U.S. 1 (1933)); sheep pasturing while traveling through a state (*Kelley v. Rhoads*, 188 U.S. 1 (1903)); and oil segregated in barrels for shipping (*General Oil v. Crain*, 209 U.S. 211 (1908)).

Essentially, these cases were developed in the late 19th and early 20th centuries in the context of a Court imposed prohibition upon the taxation of interstate

commerce that existed until *Complete Auto*. The rules turn on determining when the transit physically or constructively begins. Once the transit has begun and is interrupted by storage, a fine line must be drawn between whether the storage was necessarily incident to the goods' interstate transit or for the owner's business reasons.

After *Complete Auto* where the Court removed the blanket prohibition on the taxation of interstate commerce and replaced it with a modern analysis that seeks to prevent taxation from becoming an undue burden on interstate commerce, the pre-*Complete Auto* rules on taxation of goods in transit are anachronistic and difficult to administer in the modern world of complex commerce.

At least one treatise has characterized this Court's opinions in this field as being not very helpful when determining when a state may tax during an interruption to an interstate journey. Paul Hartman, *Federal Limitations on State and Local Taxation* 383 (1981). Equal difficulties arise in determining when interstate commerce begins.

Texas taxing authorities have struggled with the difficulty of applying this Court's pre-*Complete Auto* rules to the taxation of goods in commerce. As Texas authorities understand these rules, interstate journey begins when the property movement has begun or when the property is delivered to a common carrier for shipment. *See Coe v. Town of Errol*, 116 U.S. 517 (1886); *Marathon Ashland Petroleum L.L.C. v. Galveston Cent. Appraisal Dist.*, 236 S.W. 3d 335

(Tex. App.—Houston [1st Dist.] 2007, no pet.) In *Marathon Ashland* for example, the issue of taxability turned on the fact that the owner stored the product in its own facilities, which were connected to the interstate pipeline by a valve. *Id.* at 336. In *Virginia Indonesia Co., v. Harris County Appraisal District*, 910 S.W.2d 905, 912-13 (Tex. 1995), *cert. denied*, 518 U.S. 1004 (1996), the Texas Supreme Court, while addressing an export issue, expressly stated that until the United States Supreme Court overruled *Coe v. Town of Errol*, the court would continue to apply the doctrines to Texas cases.[11]

In Chambers County, the common carrier pipelines own many of the storage caverns, in which they constantly store refined product or natural gas incident to interstate shipment, after taking delivery of the product. The product is often sold while awaiting interstate shipment. There is a constant presence of stored product at this location. Similar situations exist across the state's vast petrochemical industry.

In this case, oil gathered in Texas is intermingled with oil gathered in a small portion of New Mexico in the same storage tanks. Although the vast majority of oil was apparently gathered in Texas and delivered to the storage tanks in Midland, some also came from out of state. Furthermore, the Court of Appeals treated all of the oil as in interstate

---

[11] Following this Court's statement in *Rodriguez de Quijas v Shearson/Am Express, Inc* , 490 U.S. 477, 484 (1989)

commerce when in fact its own findings showed that a little less than 10% of the oil is routinely delivered to three Texas refineries. *Midland*, 282 S.W.3d at 220. Furthermore, the Court of Appeals treated the mixing and blending activities that occurred at the tank farm as part of interstate transit, instead of as a business activity of the owner. See *General Oil v. Crain*, 209 U.S. 211 (1908), where the separation of oil into barrels was treated as the owner's business activity, subjecting the property to a state inspection fee.

All the molecules of the oil brought to Midland from New Mexico and Texas are essentially indistinguishable. The molecules of oil shipped to Texas refineries and those from out of state are the same. This makes application of the Court's distinction between temporary storage for the owner's business reasons and storage incident to interstate transit extremely difficult. What is more, in this case, the Court of Appeals has plainly exempted oil that is in intrastate commerce and not interstate commerce. The oil delivered to Texas refineries is more likely to have been gathered in Texas under these facts. But in fact, no one can say which oil molecule was delivered. This intermingling of both intrastate and interstate activity reveals the difficulty of applying the Court's pre-Complete Auto rulings to complex modern commerce. The oil gathered in Midland is not just in interstate commerce, it is also in intrastate commerce.

The intermingling of oil or refined product from out of state with locally gathered oil or refined product from within Texas is also an issue present for *amici*. Also, *amici* continually face issues with some of the same product that is outbound for interstate transit and intrastate transit from the same facility. The application of pre-Complete Auto standards essentially requires one to be able to distinguish when product and activities related to that product are either interstate or intrastate in character. When these products are both, these standards no longer work. Moreover, at all times, both interstate and intrastate commerce is receiving the benefits and protections of local government.

Complete Auto brought this area of jurisprudence closer to the original meaning of the Commerce Clause. The standards announced in that decision should be applicable to goods in interstate and intrastate commerce. When there is a constant presence of substantial amounts of oil or other goods stored incident to transit, as here, the Commerce Clause should not be held to shield such property from paying its fair share of taxation for the benefits that its owner receives from state and local government. *Amici* respectfully request that the Court grant the petition for writ of certiorari and provide a modern framework to address the issues that arise in the taxation of goods in interstate transit.

C. This Matter Grants the Court An Opportunity to Clarify Whether the Applicability of the Physical Presence Test To *Ad Valorem* Taxes and Further Explore What Constitutes "Substantial Nexus."

The Commerce Clause of the United States Constitution reserves to the Congress the power "to regulate commerce.., among the several states." U.S. Const., art. I, § 8, cl. 3. This Court has previously recognized a "negative" or "dormant" Commerce Clause power that "prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby, "imped[es] free private trade in the national marketplace." *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980).

Congress can act regarding interstate commerce, such as in the case of Public Law 86-262, 15 U.S.C. § 381 and the Mobil Telecommunications Tax Sourcing Act (MTSA), 4 U.S.C. § § 116-126, but unless and until it does so, state and local governments are faced with the distinct possibility that their exercise of taxing authority will impair interstate commerce. Therefore, they must err on the side of caution and not exercise that authority. If a state or local government does not hold back on the exercise of its authority, it risks violating the Constitution by trespassing on and narrowing congressional constitutional authority. The avoidance of that

violation of congressional authority is the foundation of all substantial nexus analysis.[12]

However, over the past-quarter century, nexus standards have been blurred for several reasons: (1) this Court has moved on from its historic holdings; (2) Congress has refused to act and clarify the issues involved; (3) state and local governments lack clear and commonly understood nexus standards and react in a number of various ways; and (4) when these state and local actions are taken to courts, inconsistent theoretical challenges to traditional physical presence nexus has manifested itself through a patchwork of recent cases. The cherry on this ice cream sundae of uncertainty regarding what constitutes constitutional nexus is the expanding pace and breadth of modern commercial transactions.

Based on the plain reading of this Court's jurisprudence, some sort of physical presence is required to establish substantial nexus.[13] *Quill Corp.*

---

[12] The courts, for sales and transactions taxes, have placed strict bounds on when a taxing authority may lawfully assert its authority over a remote taxpayer and that is only when the taxpayer has physical presence within that state *See Quill v. N.D.*, 504 U S 298 (1992), citing *Gibbons v. Ogden*, 9 Wheat. 1, 231-232, 239 (1824). Only when a taxpayer is physically present in a state can that state exercise its taxing authority and compel an out-of-state taxpayer to collect and remit sales taxes on its behalf Physical presence is created in various ways, including, but not limited to, offices, property, and employees located in a state. When those activities are direct, it can create substantial nexus and legally make a taxpayer subject to a state's taxing authority.

[13] The Court in *Quill* noted the focus of the Commerce Clause and its substantial nexus requirements was not on fairness for

v. N.D., 504 U.S. 298 (1992); *Nat'l Bellas Hess v. Ill. Dep't of Revenue*, 386 U.S. 753 (1967). The "substantial nexus" prong of the *Complete Auto* Test is satisfied if there is "some definite link, some minimum connection between a state and the ... property ... it seeks to tax." *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 777 (1992).

However, while the Court in *Quill* elaborated on, it did not reject all of, its prior dormant Commerce Clause analysis. Therefore, an unintended result is uncertainty of whether the physical presence requirements extend to taxes other than sales and use taxes. *Id.* at 314-317.

A leading tax commentator, has noted this uncertainty. Although "[s]ome of the results of the doctrinal changes" brought on by this Court in recent years "are clear,...the impact of the contemporary Commerce Clause philosophy on other cases decided in earlier eras, and the doctrine they spawned are less clear." 1 J. Hellerstein & W. Hellerstein, *State Taxation* para 4.13[1] (3d ed. 2010).

By granting the petition for writ of certiorari in this case, the Court could also clarify *Quill* and *Complete Auto's* holdings for taxing units and taxpayers alike on the issue of whether temporarily stored goods "in transit" have a physical presence that subjects them to *ad valorem* taxation and whether such taxation contravenes the Commerce Clause. By granting the

---

individual defendants but on concerns of effects state regulation might have on the national economy *Quill*, 504 U S at 312

petition for writ of certiorari, this Court could also address whether the first prong of the *Complete Auto* Test is met under certain facts. In this case, there was a substantial amount of oil located at all times in Midland County, Texas throughout the year. The court below recognizes that "there is a substantial quantity of oil that is constantly present in the tanks..." in Midland County. BP owned part of the oil with a physical presence in Midland County. The Court could resolve whether such property constituted a "definite link" and more than "some minimum connection" between BP and Midland County. In doing so, it would further the "substantial nexus" jurisprudence of this Court.

D. By Granting the Petition and Deciding This Case the Court Would Resolve the Disagreement Between Texas and Oklahoma, Equalizing the Demand on Government Services.

This Court should grant the petition for writ of certiorari to resolve the disagreements between Texas and Oklahoma's courts on the same constitutional question. Texas courts in this matter and one regarding Harrison Central Appraisal District, have determined that the Commerce Clause *prohibits* state *ad valorem* taxation of constantly stored large amounts of petroleum product located in mass quantities in a jurisdiction as part of an interstate pipeline system. *See Peoples Gas, Light and Coke Co. v. Harrison Cent. Appraisal Dist.*, 270 S.W.3d 208 (Tex. App—Texarkana 2008, pet. denied); *Midland Cent. Appraisal Dist. v. BP Am.*

Production Co., 282 S.W.3d 215 (Tex. App. — Eastland 2010 pet. denied). The Supreme Court of Oklahoma has held that the Commerce Clause *permits* such a tax. *See In re Assessment of Personal Prop. Taxes Against Mo. Gas Energy*, 234 P.3d 938, 959 (Okla. 2008), cert denied, 130 S. Ct. 1685 (2010). This conflict means petroleum products on an interstate pipeline stored in Oklahoma is taxable but under the same facts is not in Texas. These rulings distort governmental services and the burdens paying for them.

The fourth prong of the *Complete Auto* Test requires the tax to be reasonably related to the extent of the contact. *Commonwealth Edison Co. v. Mont.*, 453 U.S. 609, 626 (1981).

A tax is a means of distributing the burden of the cost of government, not an assessment of benefits. *Id.* at 622-23. The "relevant inquiry" is not "the amount of the tax o[r] the value of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities," but whether the tax is "reasonably related to the extent of the taxpayer's contact" with the taxing jurisdiction. *Id.* at 626. In other words, "has the State given anything for which it can ask in return" *Id.* at 625.

Such benefits and protections are not hypothetical. While this brief was being drafted, the fractionator unit at Texas Enterprise Products facility at the salt domes in Mont Belvieu, Chambers County, Texas exploded, within a few miles of a school, bringing

local fire and police units into play. The fractionator serves to separate gases for interstate shipment. [14]

If the current split between the Texas ruling in this case and the Oklahoma Supreme Court's stands, there will be a clear economic incentive for property owners to store their product in Texas, where it will not be taxed, instead of Oklahoma where it will be taxed.

As noted above and as an example, the storage facility in Chambers County could go from normally operating somewhere around 18% of capacity to storing a much greater quantity of product. As capacity grows, the potential for an emergency would logically increase. This point could be illustrated by imagining by which facility you would prefer your house to be located – an empty oil tank farm or one filled with more oil and thus more fire prone.[15]

---

[14] CNN, *Fire Burning at Texas Natural Gas Facility*, http //www.cnn com/2011/US/02/08/texas plant fire/ (last visited Feb. 8, 2011); HOUSTON CHRONICLE, *Plant Burns In Mont Belvieu Enterprise Products Operates Facility in Chambers Co* , http //www chron com/disp/story mpl/metropolitan/7418224.html (last visited Feb 8, 2011), KHOU, *Multiple Explosions, Fire at Mont Belvieu Plant*, http://www khou.com/news/cnn/Explosions-fire-at-Mont-Belvieu-plant--115579109 html (last visited Feb. 8, 2011).

[15] CNN, *Fire Burning at Texas Natural Gas Facility*, http.//www.cnn com/2011/US/02/08/texas plant.fire/ (last visited Feb. 8, 2011), HOUSTON CHRONICLE, *Plant Burns In Mont Belvieu Enterprise Products Operates Facility in Chambers Co.*, http.//www chron.com/disp/story mpl/metropolitan/7418224.html (last visited Feb 8, 2011), KHOU, *Multiple Explosions, Fire at Mont Belvieu Plant*, http //www.khou.com/news/cnn/ Explosions -fire-at-Mont-Belvieu-plant--115579109.html (last visited Feb. 8, 2011).

Although the taxing units of Chambers County will receive no additional revenue, they will have to provide more police protection, fire protection, emergency services, and other governmental services to protect the property of owners such as BP.[16]

Texas's *ad valorem* tax is a general revenue tax imposed for the support of local governments. The tax in this case applies to the presence of BP' property in Midland County, Texas as of the January 1 assessment date. It is taxed to the same extent as all other personal property in the county.[17]

BP is therefore being asked to shoulder no more than its fair share for the support of government-provided services and the "advantages of a civilized society." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979).

By granting the petition for writ of certiorari in this case and making a ruling that resolves this current

---

[16] Professor Hellerstein sees 'no basis for the conclusion that the taxpayer's gas does not receive 'police and fire protection . . . and the advantages of a civilized society '" 1 J. Hellerstein & W Hellerstein, *State Taxation* para 4 13[3][a] (3d ed. 2010)

[17] Contrary to the opinion of the Texas Court of Appeals in this case, it is not a tax on any activity of a business owner Furthermore, ownership, location, and taxability of business personal property are not contingent upon a property owner having a physical business location. Business personal property that is stored in Texas is taxable, regardless of whether it is stored in a location owned by the owner of the personal property, or stored in a leased warehouse. *See* TEX. TAX CODE ANN § 32 07(a) (West 2011).

disagreement between the highest Courts in Texas and Oklahoma, this Court would also level the demand for government services and their burdens to taxpayers between the two states – demands and costs that are currently skewed against Texas and its citizens.

CONCLUSION

For the above reasons, *amici* respectfully request this Court grant Midland Central Appraisal District's Petition for Writ of Certiorari and reverse the decision below.

Respectfully submitted,

Michael J. Darlow *
*Counsel of Record

Robert Mott
Sandra Griffin
Christopher S. Jackson
Perdue, Brandon, Fielder, Collins & Mott, L.L.P.
3301 Northland Dr., Ste. 505
Austin, Texas 78731
(512) 302-0190
(512) 323-6963 (fax)
mdarlow@pbfcm.com

Counsel for *Amici Curiae*

Supreme Court, U.S.
FILED
FEB 10 2011
OFFICE OF THE CLERK

No. 10-890

IN THE SUPREME COURT OF THE UNITED STATES

MIDLAND CENTRAL APPRAISAL DISTRICT,
Petitioner,

v.

BP AMERICA PRODUCTION CO., *ET AL*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the United States

BRIEF OF *AMICUS CURIAE* DALLAS CENTRAL APPRAISAL DISTRICT IN SUPPORT OF PETITIONERS

Peter G. Smith
Counsel of Record
NICHOLS, JACKSON, DILLARD,
HAGAR & SMITH, LLP
500 N. AKARD STREET
1800 LINCOLN PLAZA
DALLAS, TEXAS 75201
(214)965-9900
psmith@njdhs.com
Attorneys for Amicus Curiae

Dated February 10, 2011

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 2

STATEMENT OF THE CASE 4

SUMMARY OF THE ARGUMENT 4

ARGUMENT 4

I. Conflicting jurisprudence in state courts creates confusion for tax assessors and taxpayers alike and must be resolved in order for taxation to be fair and uniform nationwide. 4

II. There are two cases on which Petitions for Writ have been filed on these related issues, thus showing how important these issues are and providing a unique opportunity for this Court to clarify jurisprudence on this subject 8

III. DCAD agrees with petitioner that the Texas Appellate Court's decision is erroneous 9

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Commonwealth Edison Co. v. Montana,
453 U.S. 609 (1981) 11

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 5, 10, 11

Havill v. Gurley,
382 So.2d 109 (Fla. Dist. Ct. App. 1980) 6

In re Assessment of Personal Property Taxes Against Missouri Gas Energy,
234 P.3d 938 (Okla. 2008), *cert. denied*, 130 S. Ct. 1685 (2010) 9

In the Matter of the Appeal of the Director of Prop. Valuation,
284 Kan. 592, 161 P.3d 755 (2007). 6

Miss. River. Transmission Co. v. Simonton,
442 So.2d 764 (La. Ct. App. 1983), *writ denied*, 444 So.2d 1240 (La. 1984). 5

Mississippi State Tax Commission v. Murphy Oil USA, Inc.,
933 So.2d 285 (Miss. 2006). 5

Quill Corp. v. North Dakota,
540 U.S. 298 (1992). 10

The Peoples Gas, Light, and Coke Co. v. Harrison Central Appraisal District,
270 S.W.3d 208 (Tex. App.–Texarkana 2008, *pet. denied)* 8, 9

United Gas Pipe Line Co. v. Whitman,
390 So.2d 913 (La. Ct. App. 1980), *writ denied.*, 396 So.2d 928 (La. 1981) 5

No. 10-890

IN THE SUPREME COURT OF THE UNITED STATES

MIDLAND CENTRAL APPRAISAL DISTRICT,
Petitioner,

v.

BP AMERICA PRODUCTION CO., *ET AL.*,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the United States

BRIEF OF *AMICUS CURIAE* DALLAS CENTRAL APPRAISAL DISTRICT IN SUPPORT OF PETITIONERS

The Dallas Central Appraisal District (DCAD) respectfully submits this brief in support of the Petitioner Midland Central Appraisal District (MCAD).[1]

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief

Counsel of record of all parties received notice at least ten (10) days prior to the due date of the *amicus curiae's* intention to file this brief and the parties have consented to the filing of this brief

STATEMENT OF INTEREST

The Dallas Central Appraisal District (DCAD) is joined in the filing of this brief by the Tax Appraisal District of Bell County, the Bexar Appraisal District, the Brazoria County Appraisal District, the Collin Central Appraisal District, the Denton Central Appraisal District, The Ector County Appraisal District the Ellis Appraisal District, the Fort Bend Central Appraisal District, the Galveston Central Appraisal District, the Grayson Central Appraisal District, the Harris County Appraisal District, the Central Appraisal District of Johnson County, the McLennan County Appraisal District, the Parker County Appraisal District, the Potter-Randall Appraisal District, the Tarrant Appraisal District, the Central Appraisal District of Taylor County, the Wichita Appraisal District, and the Williamson Central Appraisal District.

These appraisal districts have a direct interest in this case. Many of the districts contain properties that will be affected by the outcome of this decision and ask the court to clarify the Texas state court jurisprudence so that they can efficiently, fairly, and effectively appraise the property in their jurisdiction. The following is a list of members and districts that have properties within their jurisdiction that contain stored natural gas, the tax assessment of which will be directly affected by the outcome of this case. While the effect of this case on these districts is not all inclusive of the effect on taxing districts in Texas, the number of entities affected allows this Court to

fully understand that this decision is critically important to taxation in Texas and thus is of national importance.

The outcome of this case will also have an effect on the taxation of personal property located within these districts beyond just the natural gas storage industry. The Harris County Appraisal District, Fort Bend Central Appraisal District, Brazoria County Appraisal District, and the Waller County Appraisal District all have salt dome storage facilities that are maintained on properties within their jurisdiction in a manner factually similar to the gas storage facilities at issue in the case. Smith County Appraisal District has salt dome storage facilities and also oil tank farms that are maintained on properties within its jurisdiction in a manner factually similar to the gas storage facilities at issue in the case. The approximate value of the oil stored in the tank farms in Smith County is $65,000,000. Fort Bend County has salt dome storage properties that are maintained and factually similar to the gas storage facilities at issue in the case. Waller County has salt dome storage properties that are maintained and factually similar to the gas storage facilities at issue in the case.

The Tarrant Appraisal District has a multitude of gas and oil pipelines located within its jurisdiction that this decision may affect such as, but not limited to, the Atmos Energy Mid/Tex Pipeline, ExxonMobil Pipeline, Sunoco Pipeline, Texas Midstream Gas Services, Western Production, and the XTO Energy pipeline.

STATEMENT OF THE CASE

The Dallas Central Appraisal District (DCAD) adopts and incorporates herein the Statement of the Case, The Statement of Facts, the Statement of Jurisdiction and the Issue Presented set forth in the Petitioner's Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

This Honorable Court should grant the Petition for Writ of Certiorari and rule on the merits of this matter so that all Texas appraisal districts will have a clear and uniform method to properly and accurately appraise natural gas being stored within their jurisdictions.

ARGUMENT

I. CONFLICTING JURISPRUDENCE IN STATE COURTS CREATES CONFUSION FOR TAX ASSESSORS AND TAXPAYERS ALIKE AND MUST BE RESOLVED IN ORDER FOR TAXATION TO BE FAIR AND UNIFORM NATIONWIDE.

The *ad valorem* taxation of oil in federally regulated storage facilities within the interstate transportation system presents a recurring issue that merits this Court's attention. The issue of taxing oil that is stored in one state and then transported to other states is a matter of nationwide concern and the clarity of the jurisprudence related to the same is of particular importance to Texas

appraisal districts and taxing authorities nationwide who are statutorily charged with the obligation of taxing all non-exempt property in their respective state.

In Mississippi, the Mississippi Supreme Court found, seemingly in conflict with this case, that a sufficient nexus existed to support taxation, overruling a Commerce Clause challenge regarding petroleum products in tanks in Mississippi which arrived by state pipeline, stayed for less than five days, and were injected into other pipelines for distribution in and out of the state. *Mississippi State Tax Commission v. Murphy Oil USA, Inc.*, 933 So.2d 285 (Miss. 2006).

In Louisiana, the jurisprudence on issues similar to the instant case relies on the archaic, pre-*Complete Auto* law, and Louisiana courts have held that gas that had come to rest in Louisiana resulting in hydrocarbons in a holding facility was taxable in Louisiana. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), *United Gas Pipe Line Co. v. Whitman*, 390 So.2d 913 (La. Ct. App. 1980), *writ denied.*, 396 So.2d 928 (La. 1981) and *Miss. River. Transmission Co. v. Simonton*, 442 So.2d 764 (La. Ct. App. 1983), *writ denied*, 444 So.2d 1240 (La. 1984).

In Florida, the courts found that petroleum products which were brought from out of state were subject to local *ad valorem* taxation under the Commerce Clause holding that nexus existed under the *Complete Auto* analysis notwithstanding that the goods were "in transit" in interstate commerce. *Havill v. Gurley*, 382 So.2d 109 (Fla. Dist. Ct. App. 1980).

The Kansas Supreme Court, on similar but not identical facts, held that non-Kansas companies' allocations of gas storage were exempt from local *ad valorem* taxation. *See In the Matter of the Appeal of the Director of Prop. Valuation*, 284 Kan. 592, 161 P.3d 755 (2007).

Because there is a multitude of underground oil storage facilities located in various locations and counties across Texas and nationwide, every appraisal district or nationwide taxing authority with a storage facility or the potential to have a facility constructed in the future within its jurisdiction has a vested interest in the outcome of this litigation.

Unless this Court rules on the merits of this case and clarifies or overturns the Texas state jurisprudence on the matter, which specifically conflicts with Oklahoma state jurisprudence and the Solicitor General's opinion on the same (which this Court declined to grant Certiorari to correct), there is a possibility that a multiplicity of additional litigation will be necessary to settle all the remaining factual issues that may distinguish each appraisal district's or taxpayer's specific factual scenario.

Further, a resolution of this issue on a federal level would greatly further judicial economy and prevent costly and prolonged litigation. For example, if a taxpayer happens to have a brick and mortar building in the county where the storage facility resides, the appraisal district or the taxpayer may be forced to sue to determine if the substantial nexus test is met under those circumstances. There is no doubt that fewer lawsuits will be filed

concerning the taxation of oil in Texas and other states if the Court grants the Petition for Writ of Certiorari and rules on the merits.

As a result of the Texas Supreme Court's decision to decline the Petition for Review of the Texas Court of Appeals, it can be argued that Texas appraisal districts are prohibited from taxing working oil that is stored in storage tanks in their districts while taxing authorities in Oklahoma faced with the prospect of taxing the exact same facility are required to tax the same. This uneven application of the law governing application of taxation of products in interstate commerce is not acceptable as a matter of public policy. These unacceptable consequences can only be remedied by this Court. The state by state consequences if this Writ is not granted are vast and expansive.

If the Texas and Oklahoma Supreme Courts' differing and contradictory holdings are allowed to stand, misguided but good faith attempts by both taxing authorities and taxpayers alike will be forthcoming with a possibility of more state Supreme Court decisions forthcoming.

The dichotomy in available approaches to local taxing authorities would mean that if the wrong authority for taxation was used, the entity would be in violation of the U.S. Constitution and result in needless expenditures of costs and resources to pursue taxation or defend the failure to tax property that is subject to taxation. Thus, this Court should grant Petitioner's Writ of Certiorari, review this case, and provide guidance for the uniform imposition of taxes on this commodity moving in interstate commerce.

II. THERE ARE TWO CASES ON WHICH PETITIONS FOR WRIT HAVE BEEN FILED ON THESE RELATED ISSUES, THUS SHOWING HOW IMPORTANT THESE ISSUES ARE AND PROVIDING A UNIQUE OPPORTUNITY FOR THIS COURT TO CLARIFY JURISPRUDENCE ON THIS SUBJECT.

On the same day that Midland Central Appraisal District filed the Petition for Writ of Certiorari in this matter, the Harrison Central Appraisal District filed Petition for Writ of Certiorari in *The Peoples Gas, Light, and Coke Co. v. Harrison Central Appraisal District,* 270 S.W.3d 208 (Tex. App.–Texarkana 2008, pet. denied). The facts of these cases are similar in that they both deal with storage of oil or gas in holding tanks associated with pipelines from the same.

In the *Harrison* case, the Texas Court of Appeals held that a generally applicable, non-discriminatory *ad valorem* tax on an inventory of natural gas violated the dormant Commerce Clause. The taxation issue in the *Harrison* case is essentially the same as in the case at bar; however, the *Harrison* case deals with natural gas inventory and the instant case deals with stored oil. On facts substantially similar to the *Midland* and *Harrison* cases, the Oklahoma Supreme Court concluded that a generally applicable, non-discriminatory *ad valorem* tax on inventory was constitutional.

Having two related Petitions for Writ of Certiorari presents an opportunity for the Court to better clarify this rule than any single petition is likely to permit. By taking this set of petitions, the Court can draw any appropriate distinctions

between oil "tank farms" like that in the *Midland* case and the gas storage facilities in the *Harrison* case. This Court should not pass up the best opportunity this Court will have to speak on these issues.

When this issue was brought to the attention of this Court in *In re Assessment of Personal Property Taxes Against Missouri Gas Energy*, 234 P.3d 938 (Okla. 2008), *cert. denied*, 130 S. Ct. 1685 (2010), this Court sought the input of the United States Solicitor General who agreed with the Oklahoma Supreme Court's Ruling.

The fact that two cases are pending before this Court at this time reiterates the importance of resolving the dichotomy of state Supreme Court opinions which can only be resolved by this Court granting the Petitions for Writ of Certiorari in both this case and in the *The Peoples Gas, Light, and Coke Co. v. Harrison Central Appraisal District*, 270 S.W.3d 208 (Tex. App.–Texarkana 2008, pet. denied) case.

III. DCAD AGREES WITH PETITIONER THAT THE TEXAS APPELLATE COURT'S DECISION IS ERRONEOUS.

DCAD adopts the totality of Petitioner's Petition for Writ of Certiorari herein in lieu of rebriefing the same issues. However, the DCAD specifically points out that it concurs that the Court of Appeals erred in three ways.

First, the Court of Appeals erred in using this Court's "Continuity of Transit" analysis to eclipse

the *Complete Auto* Analysis. The correct approach for this Court to adopt is outlined fully by the Oklahoma Supreme Court in *Missouri Gas,* which held that Petitioner failed to establish the unconstitutionality of applying Oklahoma's *ad valorem* tax on personal property to stored natural gas. The Solicitor General agreed with this holding.

Second, the Court of Appeals erred in applying *Quill's* "Physical-Presence" rule to *ad valorem* property taxation because the *Quill* case is narrow and should be limited to sales and use taxes which are clearly and wholly distinguishable from the taxes at hand. *Quill Corp. v. North Dakota*, 540 U.S. 298 (1992).

Finally, the Court of Appeals simply applied the *Complete Auto* test to the facts at hand incorrectly and should have found that, under the facts presented, the *Complete Auto* Test is completely and wholly satisfied. It is clear that the tax in question is fairly apportioned, since it only applies to gas that is actually in the storage tanks in Harrison County at the assessment date of January 1. The gas cannot be in two places at once on January 1 and thus cannot be subject to double taxation. Furthermore, the tax plainly does not discriminate against interstate commerce, as it applies to any and all inventories. The gas also has nexus with the state because the property is actually physically present in the State on the assessment date. This Court has found sufficient nexus by the nature of the presence of the property being taxed. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). Finally, and most clearly, the tax in question is patently fairly related to the services

provided by the state. It is clear that local law enforcement and other government services would be required if there was a natural or manmade disaster at the storage facilities and it is counterintuitive to argue otherwise.

This incorrect jurisprudence will have a haunting effect on taxation in Texas and perhaps nationwide. Specifically this case, as well as the *Midland* case, creates a dangerous principle that a state cannot impose property taxes without showing a nexus to some business activity. This mistake in and of itself will wreak havoc on the appraisal district which seeks to fairly and legally assess *ad valorem* taxes upon property in its jurisdiction. Secondly, these decisions make it almost impossible for an appraisal district to pass the *Complete Auto* test as modified by these rulings because under these decisions if a property is in commerce, then it lacks the nexus and thus fails the first prong of the test.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully request that this Court grant the Petition for Writ of Certiorari in this action.

Respectfully submitted,

Peter G. Smith
Counsel of Record
Nichols, Jackson, Dillard,
Hagar & Smith, LLP
500 N. Akard Street
1800 Lincoln Plaza
Dallas, Texas 75201
(214)965-9900
psmith@njdhs.com

Attorneys for Amicus Curiae

Dated: February 10, 2011

182 (3)

No. 10-890

Supreme Court, U.S
FILED
FEB 10 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MIDLAND CENTRAL APPRAISAL DISTRICT,

Petitioner,

v.

BP AMERICA PRODUCTION CO., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Texas Court Of Appeals, Eleventh Appellate District

BRIEF OF AMICI CURIAE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND AND THE TEXAS MUNICIPAL LEAGUE IN SUPPORT OF PETITIONER

DON CRUSE*
LAW OFFICE OF DON CRUSE
1108 Lavaca Street,
Suite 110-436
Austin, Texas 78701
don@doncruse.com
(512) 853-9100

**Counsel of Record*

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

How does the "substantial nexus" prong of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), apply to tangible personal property involved in commerce that is assessed a non-discriminatory ad valorem property tax:

- Is nexus, as the court below held, evaluated based on older "continuity of transit" cases exempting goods in the flow of commerce from paying their own way?
- Does nexus, as the court below held, also require a taxing authority to prove *in personam* "activity" by the taxpayer beyond the presence of the taxable *res* in the taxing jurisdiction?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iv

Interest of Amici Curiae 1

Summary of the Argument 2

Argument 4

I. There Is an Entrenched Split About How the *Complete Auto* Framework Applies To Goods in Transit, Including Gas and Oil..... 4

A. A split between Texas and Oklahoma that affects energy has broad importance 4

B. The split is firm and will not resolve itself..... 6

C. Using older cases to inform the nexus analysis distorts the *Complete Auto* framework and warrants certiorari 8

II. These Decisions Reflect an Untenable View of *Complete Auto* 10

A. The "in transit" authorities presuppose immunity from taxation in which interstate commerce does not pay its own way 10

1. "In transit" does not fit *Complete Auto*..... 12

TABLE OF CONTENTS – Continued

Page

2. "In transit" unduly penalizes competing intrastate commerce and would distort the market 12

B. For ad valorem property taxes, nexus should be measured against the goods, not the taxpayer 13

III. Both Petitions Warrant Attention 15

A. The petitions offer contrasting facts that could yield a more satisfying rule than either alone 16

B. At a minimum, this petition should be held for an eventual GVR 17

1. A GVR would ensure that the court of appeals applies the correct rule 17

2. There is little doubt that the Court has jurisdiction 17

Conclusion 20

TABLE OF AUTHORITIES

Page

CASES

Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768 (1992) 14

Appraisal Review Bd. v. Tex-Air Helicopters, Inc., 970 S.W.2d 530 (Tex. 1998) 19

Carson Petroleum Co. v. Vial, 279 U.S. 95 (1929) 11

Champlain Realty Co. v. Town of Brattleboro, 260 U.S. 366 (1922) 11

Coe v. Errol, 116 U.S. 517 (1886) 11

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) ..... *passim*

Davenport v. Garcia, 834 S.W.2d 4 (Tex. 1992) 19

Eureka Pipe Line Co. v. Hallanan, 257 U.S. 265 (1921) 11

Harrison Cent. Appraisal Dist. v. Peoples Gas, Light & Coke Co., 270 S.W.3d 208 (Tex. App. – Texarkana 2008, pet. denied) ..... *passim*

Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469 (1926) 11

In re Assessment of Personal Prop. Taxes Against Mo. Gas Energy, 234 P.2d 938 (Okla. 2008) 6, 7

Indep. Warehouses v. Scheele, 331 U.S. 70 (1947) 11

Michigan v. Long, 463 U.S. 1032 (1983) 18, 19

TABLE OF AUTHORITIES – Continued

Page

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954) 9, 11

Midland Cent. Appraisal Dist. v. BP Am. Prod. Co., 282 S.W.3d 215 (Tex. App. – Eastland, pet. denied) ..... *passim*

Miller Bros. v. Maryland, 347 U.S. 340 (1954) 14

Minnesota v. Blasius, 290 U.S. 1 (1933) 10, 11

Mississippi River Transmission Corp. v. Simonton, 442 So. 2d 764 (La. Ct. App. 1983) 5

Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995) 9

Spector Motor Serv. v. O'Connor, 340 U.S. 602 (1951) 12

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C., 467 U.S. 138 (1984) 18

Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) 20

STATUTES

28 U.S.C. §1341 2

TEX. CONST. art. VIII, §1(b) 19

TEX. TAX CODE §21.02(a)(1) 18

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Amicus Brief of American Gas Association, *Missouri Gas v. Schmidt* (No. 08-1458).....4

"Interstate Natural Gas Supply Dependency, 2007," http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/dependstates_map.html (visited Feb. 6, 2010).....4

"Intrastate Natural Gas Segment," http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/intrastate.html (visited Feb. 8, 2010).....13

INTEREST OF AMICI CURIAE

The Texas Association of School Boards Legal Assistance Fund is an association of public school districts that plays a role in litigation likely to have a broad impact on its member districts.[1]

Those school districts have a particularly acute interest in the federal constitutional questions raised in this petition because the Texas school-funding system – like many local government entities across the country – depends on a local ad valorem property-tax system.

The brief is joined by The Texas Municipal League, which is a non-profit association of over 1090 incorporated cities that provides legislative, legal, and educational services to its members.

Continued uncertainty over how ad valorem taxes fit into the Commerce Clause framework makes it more difficult to shape the local tax policy that supports critical services.

---

[1] No counsel for any party has authored this brief in whole or in part, nor has any entity other than the named amici curiae made a monetary contribution to the preparation or submission of the brief. *See* Sup. Ct. R. 37.5. Timely notice was given to all parties, and each gave written consent. *See* Sup. Ct. R. 37.2(a).

SUMMARY OF THE ARGUMENT[2]

There is now a split between two key states in the energy industry, Oklahoma and Texas, about what constitutional test applies to measure the taxability of oil and gas reserves under local ad valorem taxes.

Last Term, the Court had before it a petition challenging Oklahoma's side of the split. The Court called for the views of the Solicitor General, who expressed the view that Oklahoma had the better side of the argument and that, in any event, the Texas courts had not yet spoken with finality. Now they have, and there is no reason to delay this Court's review. A split between sister states about the federal law governing goods in transit deserves attention.[3]

The court of appeals embraced a "continuity of transit" test dating from a time when this Court had held that interstate commerce was by its nature exempt from state taxes. That test does not shed light on the modern *Complete Auto* framework, and importing it into the nexus prong threatens significant

---

[2] This amicus brief is being submitted in support of this petition and in support of *Harrison Central Appraisal District v. Peoples Gas, Light and Coke Co.*, No. 10-896, both of which raise the same constitutional issues. When necessary for clarity, the present petition is referenced as the "*Midland* case" in contrast to the "*Harrison* case."

[3] Federal circuits generally do not hear challenges to state ad valorem taxes because of the Tax Injunction Act. 28 U.S.C. §1341.

damage to ad valorem property tax rolls, shifting the burden onto domestic taxpayers and, in effect, discriminating against intrastate commerce.

Further, the court of appeals adopted a legally incorrect view of how nexus should be tested for ad valorem property taxes. The court held that substantial nexus under *Complete Auto* requires a showing of *in personam* ("activity") contacts by the taxpayer rather than contact with the taxable *res*.

These petitions frame the problem well, and their contrasting facts offer a good vehicle to test the rule. Until this Court resolves these foundational questions under *Complete Auto*, both industry and taxing authorities will be wandering in the fog of Nineteenth Century "continuity of transit" case law that ill fits the modern economy and results in sharply disparate treatment of different industries based on features unrelated to the constitutional principles underpinning the Commerce Clause.

ARGUMENT

I. There Is an Entrenched Split About How the *Complete Auto* Framework Applies To Goods in Transit, Including Gas and Oil.

A. A split between Texas and Oklahoma that affects energy has broad importance.

Texas and Oklahoma have split on a question of constitutional law that creates uncertainty for the energy industry and local governments alike. The affected states are central to the national energy industry both in geography and geology.[4]

As things stand, when oil or gas flows through pipelines that cross the Red River, it leaves one view of federal law (Texas' more expansive one that shields the goods from taxes) and encounters a polar opposite view of federal law (which permits nondiscriminatory local taxes).

---

[4] In arguing for certiorari in *Missouri Gas*, the American Gas Association pointed to a helpful Department of Energy map showing the web of gas pipelines across the lower 48 states. *See* Amicus Brief of American Gas Association, *Missouri Gas v. Schmidt* (No. 08-1458), at 17 & 3a (map). That map remains the most current on the Department's website. *See* "Interstate Natural Gas Supply Dependency, 2007," http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/dependstates_map.html (visited Feb 6, 2010). In addition to the network of interstate pipelines, it highlights 30 states that "are at least 85% dependent" on the network for natural gas from producing states such as Texas and Oklahoma. *Id.*

Consider, for example, the newly tapped Barnett Shale, which is centered just below the Red River on the Texas side of the border. Should any of this gas be sent to a storage facility north of the Red River, it can be taxed; on the south side of the Red River, it is given complete federal immunity from taxation.

The split also touches neighboring states on the interstate pipeline system.[5] For example, Louisiana courts continue to apply the older "continuity of transit" analysis when determining whether goods can be assessed an ad valorem tax.[6] Formally, they apply state enactments made when "in transit" was prevailing federal law.[7] But with the present split of authority and without guidance from this Court, Louisiana policymakers do not know what latitude they have to loosen those restrictions over local ad valorem taxation.

---

[5] For one example of how pipelines cut across these neighboring states, look at the pipeline in *Missouri Gas*. One of its two branches begins in Texas and runs through Oklahoma to Kansas, where it has a storage facility before reaching its endpoint *Missouri Gas*, 234 P3d at 944 The other begins in Oklahoma, where it has a storage facility, and then merges together with the endpoint in Kansas. *Id.*

[6] *E.g.*, *Mississippi River Transmission Corp. v. Simonton*, 442 So. 2d 764, 770 (La. Ct. App. 1983).

[7] *Id.* at 770.

B. The split is firm and will not resolve itself.

The petitions now before the Court attack two Texas decisions that, serendipitously, came down as bookends around the Oklahoma Supreme Court's decision in *Missouri Gas*, one before and one after. Both states were aware of the split and further entrenched their conflicting positions.

The Oklahoma court noted the first Texas decision in conflict with its holding. *In re Assessment of Personal Prop. Taxes Against Mo. Gas Energy*, 234 P.2d 938, 959-60 (Okla. 2008). And it expressed its disagreement in no uncertain terms:

> [W]e remain unpersuaded by that court's reasoning. The Texas court first scrutinizes Harrison County's ad valorem tax using the traditional continuity of transit analysis, **a test we reject today as having been superseded** by the Supreme Court's decision in *Complete Auto Transit v. Brady*. . . .
>
> In addition, **we decline to follow the Texas court's reasoning** in concluding that the ad valorem taxation of storage of gas fails to meet the first and fourth prongs of the *Brady* test. . . .
>
> We are convinced that **the Texas court's focus on the parties' activities and their *in personam* types of contacts with the taxing state is mistaken.** The tax at issue is an ad valorem property tax, a tax on

> property where it is located, not on the taxpayer's activities.

Id. at 959-60 n.84 (emphasis added) (discussing *Harrison Cent. Appraisal Dist. v. Peoples Gas, Light & Coke Co.*, 270 S.W.3d 208 (Tex. App. – Texarkana 2008, pet. denied)). With only one justice dissenting, Oklahoma's position is firm.

Nor has Texas budged. At the time of the Oklahoma decision, the *Harrison* opinion it so harshly criticized was pending rehearing in the court of appeals. After supplemental briefing by both sides, that court left intact its opinion, cementing the split.[8]

And when the *Midland* opinion was issued, it even more explicitly rejected the core holding of the Oklahoma case – that the old "in transit" line of cases had been superseded by *Complete Auto*. Instead, it rested its decision on that very quicksand – reliance on the old continuity of transit analysis and looking for *in personam* contacts to support an ad valorem property tax.[9] *Midland Cent. Appraisal Dist. v. BP*

---

[8] The *Harrison* opinion was issued on September 24, 2008. The Oklahoma opinion was issued on October 21, 2008. A letter brief was filed with the *Harrison* court on November 3, 2008, and a response was filed a few weeks later. The *Harrison* court denied rehearing on December 9, 2008. (Docket information for this case is available at the court website, http://www.6thcoa.courts.state.tx.us, using the "Case Search" feature and the docket number "06-07-00103-CV".)

[9] Indeed, when the *Midland* court sought to distinguish the facts from the Oklahoma case, it invoked the "in transit" reasoning that the Oklahoma court had rejected. *Midland*, 282 S.W.3d

(Continued on following page)

Am. Prod. Co., 282 S.W.3d 215, 221-23 (Tex. App. – Eastland, pet. denied) (analyzing continuity of transit); *id.* at 223-24 (using "in transit" to substitute for a nexus analysis); *id.* at 224 (looking for *in personam* contacts by the owner while discounting the property's connection to the taxing jurisdiction).

Through borrowing rigid, formalistic "in transit" precedents, *Harrison* and *Midland* have rejected the pragmatic approach to the Dormant Commerce Clause recognized in *Complete Auto*. The Texas Supreme Court's denial of review in these two petitions confirms that the split will not resolve itself.

C. Using older cases to inform the nexus analysis distorts the *Complete Auto* framework and warrants certiorari.

The *Complete Auto* test is this Court's general framework for analyzing taxes under the Dormant Commerce Clause. *Complete Auto* closed a schism between older cases presuming that states inherently lacked authority over interstate commerce and others holding that interstate commerce could be made to "pay its way." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 284 (1977). It reaffirmed that there was

---

at 224 ("The crude oil in the present case was not in storage but, rather, was in transit in the stream of interstate commerce."); *cf. Missouri Gas*, 234 P.3d at 955 ("Were the court making the old 'in transit' or 'at rest' determination, this record would make that determination very difficult.").

no "free trade" immunity from taxes on interstate commerce, *id.* at 278-79, and instead that taxes were permitted if they met the four requirements later termed the *Complete Auto* test, *id.* at 279.

Since 1977, that framework has been applied to many state and local taxes and regulations. The Court has developed a sophisticated set of tools for measuring discriminatory effect.

But the Court has given little guidance about how to interpret the first prong of *Complete Auto* – the "substantial nexus" prong. As a result, the lower courts are floundering. The *Harrison* and *Midland* courts' approach of using older cases to inform this analysis subverts *Complete Auto* by carving out an antique, Nineteenth Century "free trade" immunity for commerce. Just as anachronistically, these "in transit" cases embed into their analysis assumptions about what discrimination is or is not permissible – creating tension with the more evolved modern versions of the second and third prong of *Complete Auto*.[10]

---

[10] For example, *Midland* justifies its adherence to the "in transit" test by noting that, otherwise, multiple states might have jurisdiction over the goods at some point in their journey *Midland*, 282 S W.3d at 224 (citing *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S 157, 170 (1954)). But under *Complete Auto*, the second and third prongs address any multiple-taxation concern directly, there is no need to overload the first prong, which is simply the wrong tool *E.g., Oklahoma Tax Comm'n v Jefferson Lines, Inc* , 514 U S 175, 184 (1995).

This tension between the framework used in the older cases such as *Minnesota v. Blasius*, 290 U.S. 1, 9-10 (1933) (goods in the flow of interstate commerce have "immunity . . . from state taxation"), and the *Complete Auto* framework goes back to first principles. The continuity-of-transit cases are looking for a hook to divest states of jurisdiction – movement in commerce – by elevating the goods into a special realm of federal immunity. If that hook is imported into the nexus prong of *Complete Auto*, it would sap all the flexibility and nuance from the modern test.

II. These Decisions Reflect an Untenable View of *Complete Auto*.

The Texas courts have made two related mistakes about a single prong of the *Complete Auto* test: (1) looking to whether the oil or gas was "in transit" as a measure for substantial nexus with the state and (2) framing nexus as whether the taxpayer had other "activity" in the state beyond ownership of the taxable *res*.

A. The "in transit" authorities presuppose immunity from taxation in which interstate commerce does not pay its own way.

The Texas courts focused extensively on whether the gas or oil would be considered "in transit" – and did so by invoking cases built on the pre-*Complete Auto* idea that interstate commerce was immune from

taxation. *See Harrison*, 270 S.W.3d at 215-17 (in holding the gas was "in transit," relying on Supreme Court constitutional cases from 1886, 1922, 1926, 1929, 1933, 1947, and 1954); *Midland*, 282 S.W.3d at 221-23 (adding a case from 1921).[11]

Those cases presuppose an absolute immunity of interstate commerce from state taxing authority. *E.g.*, *Blasius*, 290 U.S. at 9-10 (continuous movement creates "immunity of the property from state taxation"); *Champlain Realty*, 260 U.S. at 276 (discussing "the immunity from state taxation [of] things actually in interstate commerce").

And that stands in tension with *Complete Auto*, which acknowledged a shift away from the constitutional understanding within which those pre-*Complete Auto* cases were decided. For that reason, they do not meaningfully inform a proper evaluation of "substantial nexus" under the modern *Complete Auto* test.

---

[11] *Michigan-Wisconsin Pipe Line Co v. Calvert*, 347 U.S. 157 (1954); *Indep. Warehouses v. Scheele*, 331 U.S 70 (1947); *Minnesota v Blasius*, 290 U.S. 1 (1933); *Carson Petroleum Co. v. Vial*, 279 U.S. 95 (1929); *Hughes Bros. Timber Co. v Minnesota*, 272 U.S. 469 (1926); *Champlain Realty Co v. Town of Brattleboro*, 260 U.S. 366 (1922); *Eureka Pipe Line Co. v. Hallanan*, 257 U.S. 265 (1921); *Coe v Errol*, 116 U.S. 517 (1886).

1. "In transit" does not fit *Complete Auto*.

The historical understanding of "in transit" cannot be imported wholesale into *Complete Auto*'s nexus prong without displacing the rest of the test. The Court stated its goal to have a "standard of permissibility of state taxation based upon its actual effect rather than its legal terminology." *Complete Auto*, 430 U.S. at 281. A return to "in transit" is a step backwards and would serve "only to distract the courts and parties from their inquiry into whether the challenged tax produced results forbidden by the Commerce Clause." *Id.* at 285.

Reviving the "in transit" test also brings back the *Spector* philosophy that "interstate commerce should enjoy a sort of 'free trade' immunity from state taxation." *Complete Auto*, 430 U.S. at 278 (discussing *Spector Motor Serv. v. O'Connor*, 340 U.S. 602 (1951)). *Complete Auto* should have dispelled those ghosts of constitutional history. Under its four-prong test, "interstate commerce may be made to pay its way." *Complete Auto*, 430 U.S. at 284-85.

2. "In transit" unduly penalizes competing intrastate commerce and would distort the market.

Natural gas, to use the example provided by the *Harrison* case, is a market where the "in transit" test would put a thumb on the free-market balance between local (intrastate) and distant (interstate)

options.[12] If storage facilities along *interstate* pipelines have a federal immunity to local tax, they will have a pricing advantage over nearby sources of gas.

The Dormant Commerce Clause should level the field for interstate commerce, not award it an unearned edge in the marketplace. The market distortion caused by this holding strongly suggests that the formalistic "in transit" rule has broken with the reality of the modern economy.

B. For ad valorem property taxes, nexus should be measured against the goods, not the taxpayer.

The court of appeals based its nexus holding on a wrongly framed legal test. Instead of asking whether the goods themselves had a sufficient nexus with Texas to support a nondiscriminatory tax, it instead asked whether the taxpayer had some other *in personam* contacts beyond ownership of the goods.

The court described this as a search for some other "activity" by the nominal owner of the oil within the borders of the state. *Midland*, 282 S.W.3d at 224.

---

[12] Texas, for example, has a substantial network of purely intrastate natural-gas pipelines. *See* "Intrastate Natural Gas Segment," http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/intrastate.html (visited Feb. 8, 2010) ("Intrastate pipelines in Texas account for 45,000 of the 58,600 miles of natural gas pipelines in the state.")

In a functionally similar test, *Harrison* looked for whether the taxpayer had some "personal presence" within the state beyond the presence of the natural gas. *Harrison*, 270 S.W.3d at 218. These formulations became central to each court's holding under the nexus prong.[13]

In one of the Court's few statements on the nexus prong of *Complete Auto*, it borrowed a due-process formulation saying that a tax requires substantial nexus "between a state and the person, property, or transaction it seeks to tax." *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 777 (1992) (quoting *Miller Bros. v. Maryland*, 347 U.S. 340, 344-45 (1954)). Before *Complete Auto*, the Court had stated how local ad valorem taxes can be imposed on local property: "Of course, the situs of property may tax it regardless of the citizenship, domicile, or residence of the owner." *Miller Bros.*, 347 U.S. at 345.

But the Court has not yet spoken so plainly about how the Commerce Clause gauges nexus over these same ad valorem taxes after *Complete Auto*.

In the absence of specific guidance, the lower courts now disagree about what test to use for nexus. Oklahoma looks for nexus with the property.

---

[13] The court of appeals acknowledged, "the oil itself had a substantial nexus with this state." 282 S.W.3d at 224. And *Harrison* noted that "[i]f one were to look strictly at the generic act of storing gas . . . it might appear that such an activity would have a substantial nexus with the State." 270 S.W.3d at 218.

Missouri Gas, 234 P.3d at 955 (looking to the presence of the gas, not the taxpayer, within the state). But the Texas courts have looked for nexus with some "activity" of the out-of-state owner of the property being taxed. *Midland*, 282 S.W.3d at 224; *Harrison*, 270 S.W.3d at 218.

Looking to nexus with the owner's "activities" would lead to bizarre results for local governments who depend on ad valorem property tax. For these local taxing jurisdictions, marshaling such proof may be a challenge. Nor does distinguishing between taxable property based on whether its owner happens to have *other* activities or property nearby further the constitutional values underpinning the Commerce Clause. The Court should clearly state that nexus for ad valorem property taxes should be measured against the property being taxed, not its owner.

III. Both Petitions Warrant Attention.

With *Harrison* and *Midland*, the Court can choose between two petitions raising the same constitutional issue. In the Texas Supreme Court, these two cases were briefed in parallel and treated by the parties as intertwined.

The Court should consider taking the petitions as a pair. Failing that, it should grant a lead petition and, ultimately, vacate and remand the other.

A. The petitions offer contrasting facts that could yield a more satisfying rule than either alone.

Although both petitions involve products of the energy industry, the fact patterns differ in ways that bear on the older "in transit" analysis. As a pair, they may offer a more satisfying way to announce a rule than any single, later petition is likely to do:

(1) The *Harrison CAD v. Peoples Gas* petition presents a classic case of natural gas storage facilities, akin to a warehouse for goods. This should have passed muster even under the old "in transit" cases because the gas was stored for business reasons, such as shifting supply to meet seasonal variations in market demand.

(2) The *Midland CAD v. BP America* petition presents something more akin to a cross-dock for goods, where some oil barely pauses and other oil is subjected to "batching," "blending," and "staging" for different purposes and lasting different periods of time.[14] Although the better holding is that taxing this property satisfies *Complete Auto*, this is a closer case.

By taking this set of petitions, the Court can announce a rule that deals both with goods arguably

---

[14] Even under a strict "in transit" analysis, some of these operations might interrupt the continuity of transit. For example, "blending" combines fuel with different characteristics to make a more marketable product than its original components.

"in transit" under pre-*Complete Auto* jurisprudence (such as oil in the *Midland* tank farm) and goods that are plainly "in storage" under that view (such as the gas in *Harrison*). Addressing both at once is the surest way to remove the confusion over how, if at all, these concepts fit under *Complete Auto*.

B. At a minimum, this petition should be held for an eventual GVR.

1. A GVR would ensure that the court of appeals applies the correct rule.

The *Midland* opinion directly discussed *Harrison*, concluding that the facts in its own case "present[ ] an even stronger case for a Commerce Clause violation than did the circumstances in [*Harrison*]." 282 S.W.3d at 223-24.

The reason? Its reading of pre-*Complete Auto* cases about whether goods are "in transit." *Id.* at 221-22 (citing no federal cases from after 1933); *id.* at 224 (citing "in transit" as key to nexus). If the Court grants review in *Harrison* and ultimately (and correctly) reverses, then a vacatur and remand of *Midland* would permit it to apply the modern test.

2. There is little doubt that the Court has jurisdiction.

The *Midland* opinion discusses a provision of Texas law that asks if the property being taxed was

present "for more than a temporary period." TEX. TAX CODE §21.02(a)(1); *Midland*, 282 S.W.3d at 224. Without referencing any state case law – and without even offering a construction of the statutory text – the opinion pointed back to its much more extensive discussion of federal law ("[a]s discussed above") to explain how it applied state law. *Id.* at 224-25.

As a threshold matter, a state-law ground only affects this Court's jurisdiction if its independence is "clear from the face of the opinion." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). Nowhere does the opinion state that this was an *independent* question of state law. Nor does it say that the scope of the Texas statute ("more than a temporary period") in any way departs from federal constitutional constraints. Instead of an independent state-law analysis, the opinion cross-referenced its federal holding. *Midland*, 282 S.W.3d at 224.

Second, the Court has jurisdiction whenever "a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984). Federal law, including an extensive discussion of whether the oil was "in transit" under pre-*Complete Auto* precedents, 282 S.W.3d 221-22, drove the outcome here.

Third, although the presumptions of *Michigan v. Long* make further inquiry unnecessary, this area of

Texas law is in fact deeply "interwoven" with federal law. *Id.* at 1040.

That's because Texas pushes its taxing jurisdiction over tangible personal property to the constitutional limit; only those exemptions spelled out in the state constitution or required by conflicting federal law are permitted; mere state statutes cannot authorize exemptions.[15] *Appraisal Review Bd. v. Tex-Air Helicopters, Inc.*, 970 S.W.2d 530, 534 (Tex. 1998) (holding that another portion of this statute was permissible as "an attempt to comply with United States constitutional mandates").[16]

When a state has bound itself to an unduly limiting view of federal constraints – when driven by "what it understood to be federal constitutional considerations to construe and apply its own law in

---

[15] TEX. CONST. art. VIII, §1(b) ("All real and personal property in this State, unless exempt as required or permitted by this Constitution . . shall be taxed in proportion to its value") No party has argued that these goods are exempt under any *state* constitutional provision. The only possible source of exemption is federal law

[16] In cases involving state constitutional rights, Texas courts have been instructed to make clear whenever they rely on a presumed deviation between state and federal law. *Davenport v. Garcia*, 834 S.W 2d 4, 20 (Tex. 1992) (an opinion should, if appropriate, "provide a 'plain statement' that it is relying on independent and adequate state law"). The *Midland* court did not There is no state constitutional exemption at issue here; only federal exemptions could apply

the manner it did," *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 568 (1977) – this Court is in a unique position to protect the balance of federalism by granting review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

DON CRUSE*
LAW OFFICE OF DON CRUSE
1108 Lavaca Street,
Suite 110-436
Austin, Texas 78701
don@doncruse.com
(512) 853-9100

**Counsel of Record* *Counsel for Amici Curiae*

Dated: February 10, 2011